No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

KENNETH L. McGINNIS, et al,

Petitioners,

v

JAMES ANTHONY SWEETON, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER STATE STATUTES AND REGULATIONS WHICH SET FORTH PROCEDURES FOR THE PAROLE REVIEW PROCESS BUT WHICH CONFER NO SUBSTANTIVE RIGHTS AND IMPOSE NO LIMITATIONS ON THE DISCRETION OF THE PAROLE BOARD GIVE RISE TO A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE.

II

WHETHER THE CONTINUED ENFORCEMENT OF A 1981 CONSENT DECREE, DESIGNED SOLELY TO FORCE MICHIGAN TO COMPLY WITH ITS OWN STATUTORY PROCEDURES REGARDING PAROLE BOARD ACTIVITIES, IS BARRED BY THE ELEVENTH AMENDMENT.

LIST OF PARTIES

The Petitioners are Kenneth L. McGinnis, Director of the Michigan Department of Corrections; Martin Makel, Marvin May, Jacqueline E. Moss-Williams, Ronald E. Gach, Sandra J. Johnson, Thomas Patten, Members of the Parole Board of the State of Michigan, all of whom have been automatically substituted as parties pusuant to Supreme Court Rule 35.3. The lawsuit was initially brought against Perry Johnson, Director of the Michigan Department of Corrections; Leonard McConnell, Chairman of the Parole Board of the State of Michigan; Gordon Fuller, Howard Grossman, Hondon Hargrove, Donald Thurston, Delores Tripp, Edward Turner, Members of the Parole Board of

the State of Michigan. During the District Court proceedings, Robert Brown, Jr., succeeded to the office of Director and was substituted for Perry Johnson as a party.

The Respondents are James Anthony Sweeton, Oscar Partee and James Sikon, individually and on behalf of all other persons similarly situated.

All parties in the District Court and Court of Appeals are parties in this Court.

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The Opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for publication and is reprinted at App 1-56a. The underlying Opinion of the U.S. District Court for the Eastern District of Michigan was filed August 17, 1978, and appears as App 109-126a.

JURISDICTION

The Opinion of the Court of Appeals was entered on September 17, 1991. The jurisdiction of the Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted

> against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Complaint below was filed on September 16, 1977 on behalf of a class of all inmates within the jurisdiction of the State of Michigan Department of Corrections (MDOC), whose parole eligibility is determined by the State of

Michigan Parole Board. The Complaint, as amended, alleged several counts claiming a violation of the Fourteenth Amendment attributable to Parole Board procedures, and a pendent state claim alleging that the State was not complying with its statutes and regulations in the criteria used to grant or deny paroles.

In March, 1978, Petitioners filed a motion to dismiss or in the alternative for summary judgment. On August 17, 1978, the U.S. District Court for the Eastern District of Michigan granted Petitioners' motion to dismiss "... as to the claims raised under the United States Constitution," (App 111a), but denied the alternative motions as to the remaining claim "... that the State is not complying with its own statutes and

regulations," in deciding whether or not to grant parole release to Respondents. (App 111a). On November 16, 1978, an order entered granting the Respondents' request for class certification.

The District Court held, as a basis for granting Petitioners' Motion to Dismiss, that the United States Supreme Court and the Sixth Circuit Court of Appeals previously established that requirements of due process were inapplicable to parole release hearings. Thus, all claims brought in the Complaint concerning due process violations under the Constitution of the United States were dismissed. There was no appeal taken by the Respondent class to this ruling.

The only issue remaining was whether the State of Michigan was complying with

its own statutes and regulations when deciding parole cases. Although the District Court opined that established procedures must be followed by the Parole Board to avoid "abrogating" a prisoner's rights (even though there was no doubt in the opinion of the District Court, or the Court of Appeals, that there never existed in this case a liberty interest to a parole, see App 18-19a), the District Court contemplated rendering a decision on the remaining issue of compliance with statutory regulations after a more complete record was developed. (App 125a).

On August 24, 1979, Petitioners filed an Answer to the First Amended Complaint denying federal jurisdiction and moved for abstention on the remaining claim on

October 5, 1979. The case was reassigned to another district judge who rendered a "Judgment" dated March 31, 1981 on three outstanding issues concerning inmates' access to files, distribution of an informational booklet, and the request for abstention. Contained in the Opinion that accompanied the March 31, 1981 "Judgment" were the comments about the previously rendered Opinion of August 17, 1978 in which the District Court asserted that the first District Judge actually decided that parole procedures alone created a liberty interest.

After a period of negotiations, a Consent Judgment was entered on August 28, 1981 consisting of very detailed procedural requirements designed solely to improve the parole process.

(App 62-108a). The introductory clause to the 1981 Consent Decree states: "[P]ursuant to the statutes, rules and policies which establish, define, and regulate the parole process, this process should be administered in an effective and fair manner, and afford each prisoner the rights to which he or she is entitled." (App 64a). The 1981 Consent Decree was silent as to what issues were resolved, nor was there any language constituting waiver of any defenses that Petitioners may have.

Most provisions of the 1981 Consent Decree tracked state law procedure regarding parole hearings. One provision of the 1981 Consent Decree states:

> Nothing herein is intended to alter, modify, divest, or otherwise limit the rights and duties which the Legislature has provided to the Parole Board within the parole

decision-making process.
(App 80a).

The 1981 Consent Decree also placed a limitation upon the jurisdiction and duration of the case in paragraph VIII, L providing:

> Plaintiffs' participation in monitoring described in this section shall continue for 30 months, unless the Court extends this period for good cause shown. The court shall retain jurisdiction of this cause for the pendency of this monitoring period, and shall have the power to make further orders consistent with the decree.
> (App 95-96a).

Petitioners filed a Motion to Vacate the Judgment on February 27, 1984 on jurisdictional grounds, including an assertion of the Eleventh Amendment. On March 1, 1984, Respondent filed a Motion to Extend the Monitoring Period.

On May 31, 1984, the District Court issued an Opinion, but no Order, denying the Motion to Vacate and also suggesting that the Respondents close out the monitoring period through submission of a final report. For reasons not appearing of record, the District Court delayed entry of an Order denying the Petitioners' Motion to Vacate until November 28, 1984. Also, on November 28, 1984, the District Court entered an Order extending the monitoring period retroactively to end on November 30, 1984.

A final monitor's report was filed on June 18, 1985, characterizing the actions of Petitioners as consistently making a good faith effort to comply with the Judgment. There was no further relief sought from the District Court by either party.

After years of repose, new attorneys for Respondents filed appearances, and the District Court reopened monitoring on June 16, 1988, after finding non-compliance with the 1981 Consent Decree.

In February, 1990, Respondents filed a motion for an order finding Petitioners in non-compliance with the Consent Judgment and for appointment of a special master.

In March, 1990, Petitioners filed, pursuant to Fed. R. Civ. P. 60(b)(4) and (5), a Motion to Vacate the 1981 final Consent Judgment and dismiss the action asserting lack of jurisdiction to enter the Order, and that tne 1981 final Order was void as a matter of law. On May 24, 1990, the District Court entered an Order denying the Motion to Vacate and Dismiss,

finding that jurisdiction existed and that Petitioners were non-compliant with the consent decree. (App 57-61a). The District Court also granted one modification to the Consent Decree, continued the monitoring for one year, and appointed a U.S. Magistrate as a special master/ independent monitor. Both Petitioners and Respondents requested rehearings which were denied. Both Petitioners and Respondents filed appeals.

On September 17, 1991, the United States Court of Appeals for the Sixth Circuit filed an Opinion affirming the District Court's denial of the Motion to Vacate, but reversing the District Court's one modification. (App 1-56a). The Court of Appeals, with respect to the jurisdictional issue of what liberty

interest was underlying the 1981 consent decree, said:

> The lower court on numerous occasions stated that the liberty interest involved is not in the right to parole, since none exists under the Greenholtz rationale, infra, but in the state-created procedures that make up the parole decision-making process.
> (App 18-19a) (Emphasis added).

The Court of Appeals has characterized the liberty interest, as the District Court did, as one which was purely procedural existing without a specific substantive predicate:

> In sum, although the Parole Board may have discretion in the eventual parole decision, the state, through statutes and regulations, has taken away any discretion in parole procedures. Therefore, the Michigan parole scheme is not wholly discretionary -- it limits the Parole Board's authority by requiring it to follow certain procedures.
> (App 24a).

The Eleventh Amendment defense to jurisdiction was summarily denied by the

Court of Appeals. Specifically, the Court of Appeals stated that the Eleventh Amendment was not a bar to the District Court's jurisdiction because the 1981 Consent Decree was based upon state law "... only to the extent that the state laws created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment." (App 26a, n7).

One Court of Appeals Judge concurred in the September 17, 1991 judgment and all but Part II (Jurisdiction) of the Opinion observing that the District Court's power to grant relief from the outset was "problematic," and further stated:

> The problem was that neither state law nor federal law created any substantive right to the "liberty" that release on parole would represent. The district court tried to circumvent the problem, as has been noted, by holding that when the state

required "that certain procedures be followed in determining whether or not an inmate is entitled to parole, independent liberty interests are created ...." In the light of subsequent case law, it is safe to say that this analysis was almost certainly incorrect.

* * *

It is probably unfortunate that this case was permitted to go forward in a federal court. The defendants having accepted the federal court consent decree without reservation, however, I agree that the challenge to the court's jurisdiction comes too late. (App 52-56a).

This Petition follows the September 17, 1991 Court of Appeals Opinion.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS RULING WHICH FOUND THAT THE CREATION OF A LIBERTY INTEREST CAN ARISE FROM PROCEDURAL PROVISIONS UNCONNECTED TO A SUBSTANTIVE LIMITATION ON OFFICIAL DISCRETION IS SQUARELY IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS, INCLUDING THE SIXTH CIRCUIT.

The Court of Appeals Opinion that procedures alone created an enforceable decree in federal court, without the existence of a substantive predicate liberty interest is contrary to the U.S. Supreme Court's numerous decisions, many cited by the Court of Appeals in support of its conclusion, starting with Wolff v. McDonnell, 418 U.S. 539 (1974), and concluding with Kentucky Dept of Corrections v. Thompson, 490 U.S. 454 (1989).

The Court of Appeals' Opinion in this

case (see App 18-19a) readily acknowledged, as the District Court did in its 1978 Opinion dismissing all "... claims raised under the United States Constitution," that there never existed a substantive interest to a parole. The grant of a parole in Michigan is discretionary under state statutes. There is no dispute by the parties, the District Court, or the Court of Appeals that the remaining issue, after dismissal of all claims under the United States Constitution, was whether the State was complying with its own procedures regarding the exercise of discretion in granting or denying paroles. Indeed, the Consent Decree entered in this case never purported to do anything more than to impose a highly intrusive procedural scheme designed to track state law on parole release hear-

ings, and monitor how well or poorly the state was complying with the process alone. The Consent Decree itself never created an entitlement to parole, because the District Court properly ruled there was none. (App 117-118a).

The Court of Appeals, in purporting to engage in the required careful analysis contemplated by Kentucky Dept of Corrections v. Thompson, supra, offered the following observation:

> In sum, although the Parole Board may have discretion in the eventual parole decision, the state, through statutes and regulations, has taken away any discretion in parole procedures. Therefore, the Michigan parole scheme is not wholly discretionary -- it limits the Parole Board's authority by requiring it to follow certain procedures. (App 24a) (Emphasis added).

Completely ignored by the Court of Appeals is paragraph V.B.4 of the 1981

consent decree memorializing the opposite conclusion:

> Nothing herein is intended to alter, modify, divest or otherwise limit the rights and duties which the Legislature has provided to the Parole Board within the parole decision-making process.
> (App 80a).

The consent decree provision clearly recognizes the discretion of the Parole Board, as well as effectively undercuts the entire rationale offered by the Court of Appeals in reaching its conclusion.

The concurring Opinion by the Court of Appeals correctly observed, regarding the subject matter jurisdiction, that not only was the power to grant relief from the outset "problematic", but that it was also "unfortunate that this case was permitted to go forward in a federal court"

and that the District Court's analysis was "... almost certainly incorrect" in light of the case law regarding creation of substantive rights entitled to due process protection. (App 52-54a). Indeed, the concurring Court of Appeals Opinion also correctly identified the problem of a complete absence of a substantive right as representing an obstacle for the District Court to "circumvent," leading, of course, to the flawed conclusion, affirmed by the Court of Appeals, that process alone can establish a liberty interest entitled to more due process. (App 53a).

The fact that a consent decree was involved in resolving the remaining State claim does nothing to alleviate the basic requirement that a substantial federal

question must first exist for a federal court to not only assume jurisdiction, but to continue retaining it. This case is not a matter involving mere over-breadth of a remedy contained in a consent decree that also resolves clear substantial federal questions such as Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989), cert. denied, 110 S.Ct. 865 (1990).

A continuing theme reappearing in Supreme Court cases analyzing due process claims, particularly concerning parole release decisions, is the need to establish an interest in parole release as the predicate to triggering due process considerations. In Board of Pardons v. Allen, 482 U.S. 369, 377-378 (1987), this Court said, "Significantly, the Montana

statute, like the Nebraska statute, uses mandatory language ("shall") to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." (Footnote omitted). The Court in Olim v. Wakinekona, 461 U.S. 238, 249 (1983), further explained that a protected liberty interest is created "... by placing substantive limitations on official discretion." The uncontested finding of the district court in this case is that, "... in this circuit at least, the requirements of due process are not applicable to parole release hearings." (App 117-118a).

The fact that there was an affirmative finding of the nonexistence of a substantive right to parole should have ended whatever questions the Court of

Appeals might possibly have harbored about whether a liberty interest was created or was underlying the consent decree. Instead, the Court of Appeals Opinion concludes, without the requisite close analysis of relevant statutes, that their opinion does not constitute a departure from established Supreme Court precedent.

Indeed, one only needs to read Kentucky Dept of Corrections v. Thompson, supra, 490 U.S. at 461, to be reminded that the proper analysis and inquiry "always has been to examine closely the language of the relevant statutes and regulations" to discern the existence of "... relevant mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in

determining whether an inmate may be deprived of the particular interest in question." Id. at 464, n4.

Allowing procedural rules rather than a substantive right to be elevated to a liberty interest results in process becoming an end in itself, and a "needless formality." Olim v. Wakinekona, supra, 461 U.S. at 250. In Brandon v. District of Columbia Board of Parole, 823 F.2d 644 (DC Cir. 1987), the Court rejected the plaintiff's claim to a parole hearing as a liberty interest because of the "... overwhelming logic of the Supreme Court's pronouncement in Olim and the plethora of case law against him." Id. at 648. The Court in Brandon declined to expand the concept of procedural due process and joined several

other circuits which held similarly, including the Sixth Circuit in Naegele Outdoor Advertising Co v. Moulton, 773 F.2d 692, 703 (6th Cir. 1985), cert. denied, 475 U.S. 1121 (1986). The observations made in the Brandon Opinion are compelling and succinct:

> ... Brandon would have us interpret the Due Process Clause to mean that the Board may not deprive him of his parole hearing without providing him a hearing. This circular result demonstrates the illogic of attempting to locate a separated protected liberty interest in procedural rules created by governmental bodies. In fact, Brandon asks us to abandon altogether the standard due process analysis. Instead of identifying the substantive interest entitled to constitutional protection and then determining what process is due before an individual can be deprived of that interest, see Morrissey, 408 U.S. at 481, Brandon would have us equate the process due with the substantive interest.
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> * * *
>
> If Brandon's approach were adopted, there would be a constitutional procedural due process right to have

states adhere to any procedural rules promulgated by them." Id. at 648-649.

The ease with which the Court of Appeals in Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d. 233 (6th Cir. 1991), analyzed an identical claim involving a release on parole liberty interest issue suggests that the conclusion in this case was influenced by the existence of a consent decree. (App 27a, 32-36a). As this Court is aware, the existence of a consent decree was also a factor in Kentucky Dept of Corrections v. Thompson, supra, leading to a reversal of the Court of Appeals' Opinion that a liberty interest to prison visitation was created by a consent decree and State regulations in that case.

The mere existence of a consent decree in federal court does not guarantee that a substantial federal question was ever presented, resolved or served to vindicate federal rights. A federal court is obligated to consider threshold Article III impediments both to the initiation and maintenance of an action. Glass Packaging Institute v. Regan, 737 F.2d 1083 at 1087-1088 (DC Cir), cert. denied, 496 U.S. 1035 (1984). The Supreme Court has emphasized the limitations on the power of federal courts to hear claims filed by persons challenging "the way in which government goes about its business" of enforcing the law. Allen v. Wright, 468 U.S. 737, 760 (1984); Stern v. Tarrant County Hosp. Dist., 778 F.2d 1052, 1060 (5th Cir. 1985) (en banc), cert. denied, 476 U.S.

1108 (1986): "The federal judiciary, for its part, has enough federal law to enforce without annexing new bodies of state legislation. We must, and will, leave violations of state law to be corrected by the appropriate state mechanisms."

The ability of a federal court to enter a consent decree "... must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction." Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986).

All federal courts have a duty to notice a failure of subject-matter jurisdiction on its own motion and to correct the mistake no matter how belated even on appeal. Potomac Passengers Ass'n. v.

Chesapeake & Ohio Ry Co., 520 F.2d 91, 95 (DC, Cir. 1975).

When the District Court entered the consent decree in 1981, all claims under the U.S. Constitution had been dismissed on the finding contained in the August 17, 1978 Opinion that Michigan statutes provided no substantive right to a release on parole. The District Court in 1981 had only the pendent claim concerning allegations that the state was not following its regulations in granting or denying paroles when the consent decree was entered. The consent decree entered in 1981 could not spring from and serve to resolve a dispute within the subject-matter jurisdiction of the Court, especially on a theory that process alone needs due process protections. The Sixth

Circuit's opinion in Wal-Juice Bar, Inc. v. Elliott, 899 F.2d 1502 (6th Cir. 1990), reh'g denied, held that before a district court addresses state issues it must first determine that a substantial federal issue is presented. Without a substantial federal question underlying the consent decree, as discerned from pre-existing decisions of the Supreme Court, a decision on state claims, as in this case, should not have been made and the decree should be vacated.

II.

THE COURT OF APPEALS DECISION IMPROPERLY DENIED PETITIONERS' ASSERTION OF AN ELEVENTH AMENDMENT DEFENSE BY ERRONEOUSLY HOLDING THAT THE CONSENT DECREE WAS BASED UPON THE CREATION OF A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The erroneous determination by the Court of Appeals that a liberty interest

was created by process alone and further that the consent decree "... was based on state law only to the extent that the state laws created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment" (App 24a, 26a), constituted the basis upon which Petitioners were denied an Eleventh Amendment defense.

As presented in Part I of this Petition for Writ, there was never a viable federal claim that could attach to the remaining issue after the District Court dismissed all claims under the U.S. Constitution and the remaining issue, enforcement of State procedures, implicated no federal rights. Indeed, the consent decree also memorialized the discretion still retained by the Parole

Board on the decision to release on parole. (App 80a).

The need in this case for the Court of Appeals to find that a liberty interest had been created was necessary to circumvent the strictures of Pennhurst State School v. Halderman, 465 U.S. 89 (1984), which bar a federal court from assuming or retaining a case that served to enforce only State law.

In Lelsz v. Kavanagh, 807 F.2d. 1243 (5th Cir), reh'g denied, 815 F.2d 1034 (5th Cir), cert. dismissed, 483 U.S. 1057 (1987), the Fifth Circuit, in a case very analogous to the present case, undertook a careful examination of a consent decree which had been entered in 1983. The consent decree was 45 paragraphs of specific and general guidelines for improvement of

mental health services rendered by the State. The Court in Lelsz found the Eleventh Amendment, particularly as analyzed in Pennhurst, supra, barred enforcement of provisions which merely tracked State law and also forbade the District Court, on remand, from enforcing provisions grounded in State law.

The present case represents an even clearer basis upon which the bar of the Eleventh Amendment should have been applied. In this case, there is a complete absence of a federal right that was either resolved or undergirds the decree. There is not a single paragraph of the entire consent decree in this case that serves to resolve a dispute within the jurisdiction of the Court. This case represents a clear example of enforcement

of highly intrusive procedures that track State law and thus represents a square conflict with numerous Supreme Court rulings construing the application of the Eleventh Amendment.

The defense of the Eleventh Amendment was raised by Petitioners before the Court of Appeals, and when raised, the Court of Appeals should have examined each claim to discern if any are barred, as was done by the Court in Lelsz v. Kavanaugh, supra. The Court of Appeals in this case found a liberty interest without the requisite analysis, and then deprived Petitioners of a valid Eleventh Amendment claim on the basis that procedures alone could create a liberty interest.

CONCLUSION

The Court of Appeals decision is contrary to a long line of Supreme Court precedent on creation of a liberty interest, contrary to the ban against enforcing State law as enunciated in Pennhurst, supra, and contrary to the command that consent decrees must resolve disputes within the Court's subject matter jurisdiction as articulated in Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, supra.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Nos. 90-1800/1807

JAMES ANTHONY SWEETON, et al.)
Plaintiffs-Appellees-)
Cross-Appellants)
v
ROBERT BROWN, JR., et al.)
Defendants-Appellants-)
Cross-Appellees)

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed September 17, 1991

Before: NELSON and GUY, Circuit Judges; and HIGGINS, District Judge*

HIGGINS, District Judge.

The defendants (appellants) appeal and the plaintiffs (appellees) cross-appeal the district court's order denying

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*The Honorable Thomas A. Higgins, United States District Judge for the Middle District of Tennessee, sitting by designation.

the defendants' motion to dismiss and partially modifying a consent decree issued in 1981. For the reasons that follow, we affirm in part, reverse in part and remand.

I. Background

This appeal arises out of a final consent judgment entered into between the State of Michigan Department of Corrections and a class of inmates and approved by the district court on August 28, 1981. This action was brought in September 1977 by a class of inmates within the jurisdiction of the State of Michigan Department of Corrections (MDOC), whose parole eligibility is determined by the State of Michigan Parole Board. The defendants/appellants are the director of the MDOC and the members of the Michigan Parole

Board. The suit challenges the practices of the MDOC and the Parole Board concerning the timeliness of hearings and decisions and the lack of guidelines in the parole decision-making process. This action does not concern the actual granting of parole, but only the procedures in making and implementing parole decisions. The inmate class asserts that the MDOC and Parole Board have violated their rights to due process under the Fourteenth Amendment to the Constitution of the United States.

A review of the history of this action is helpful in understanding the lower court's rulings concerning the consent decree and the most recent ruling granting a modification.

1977-1987

The complaint was filed by the inmate class on September 15, 1977, addressing

the issues discussed above.

In March 1978, the appellants filed their first motion to dismiss or, in the alternative, for summary judgment for failure to state a federally cognizable cause of action. In August 1978, the district court (Feikens, J.) granted the appellants' motion to dismiss as to the claims raised under the Constitution of the United States, but denied the alternative motion as to the claim that the State of Michigan was not complying with its own statutes and regulations when deciding whether to grant parole. In granting the motion, the lower court held that the Supreme Court of the United States and the Sixth Circuit Court of Appeals had previously established that the requirements of due process are not applicable to parole release hearings.

Accordingly, the court dismissed the appellees' claims that the procedures employed by the State of Michigan violated their rights to due process under the Constitution of the United States. Therefore, the only issue that the court left open was whether there arose a state-created liberty interest by way of statutes, rules or procedures that would entitle the appellee class to due process protections. The appellee class did not appeal this ruling.

In October 1979, the appellants filed another motion to dismiss or, in the alternative, a motion for abstention order. The appellants argued that the issues presented in the action were dependent upon a judicial interpretation of state statutes, rules, policies and regulations, which are all matters more

properly within the domain of the state courts. Alternatively, the appellants asserted that the district court should abstain from ruling in the action, pending resolution of the issues by state tribunals. In March 1980, after the case was subsequently reassigned to the Honorable Anna Diggs Taylor upon her appointment to the federal bench, the court heard oral argument and denied the appellants' motion.

The parties stipulated to a series of partial consent judgments in March and April 1980. These partial consent judgments were consolidated and, after notice to all class members, the district court approved a final partial consent judgment in December 1980.

Thereafter, cross-motions for summary judgment were filed concerning the appel-

lees' access to their MDOC records. These claims were resolved in the appellees' favor by the court's order dated March 31, 1981. In this order and opinion, many of the due process issues that the appellants presently raise are addressed. The district court stated:

> Most importantly, the law of this case, as formulated by Judge Feikens more than two years ago when this litigation was on his docket, is that the existence of state statutes, regulations and policies regarding the parole system as a whole impart <u>independent</u> liberty interests to those inmates participating in the system. (emphasis in original).

The appellants appealed the above ruling. On August 28, 1981, the court signed a final order approving a final consent judgment. This final consent judgment was a consolidation of the earlier final partial consent judgment, the

court's March 31, 1981, order and stipulations of the parties. Also on August 28, 1981, the court amended its order of March 31, 1981. In December 1981, the appellants dismissed their appeal because the terms of the final consent judgment were satisfactory to all parties and the basis for their appeal no longer existed.

The final consent decree provided for a monitoring period of thirty months, which the court later extended until December 1984. The monitoring provision also deals with jurisdiction. Paragraph VIII(L) provides:

> Plaintiffs' participation in monitoring described in this section shall continue for 30 months, unless the Court extends this period for good cause shown. The Court shall retain jurisdiction of this cause for the pendency of this monitoring period, and shall have the power to make further orders consistent with this decree.

In February 1984, the appellants filed their first motion to vacate the final consent judgment pursuant to Rule 60(b), Fed. R Civ. P. The appellants claimed, inter alia, that:

1. the consent judgment was based exclusively on state law and thus the lower court lacked jurisdiction to enter it;

2. prior to entering the 1981 judgment, the lower court did not have a full opportunity to review the impact of the Supreme Court's 1979 decision in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 210, 60 L.Ed.2d 668 (1979); and

3. the consent judgment should be vacated because of statutory changes that were not in effect at the time of the

court's earlier decision.

In November 1984, after briefing and argument by the parties, the lower court denied the appellants' motion to vacate the final consent judgment. The appellants did not seek rehearing or appeal this decision.

At the hearing on the appellants' motion, the district court (Taylor, J.) stated:

> The Court's jurisdiction over this case is and was proper, and this judgment may not now be vacated under the Federal Rules as being void. The Federal Court has jurisdiction to determine its own judicial authority. So, if the defendant has challenged the Court's subject matter jurisdiction and the Court issue has been resolved against defendant by a final judgment, the judgment is not void but is Res Judicata on the issue of jurisdiction.
>
> In this case the Defendants have challenged the Court's subject matter jurisdiction at least three times, and ruled [sic] against at least that many times on, specifically, the question of whether this Court had

> jurisdictional authority to hear and decide this case.

Transcript, May 31, 1984.

A final monitor's report was submitted in June 1985. On June 18, 1985, the parties stipulated to termination of the monitoring period.

1987-1990

In August 1987, the lower court reopened this case and appointed substitute counsel to represent the inmate class in light of indications that the appellants had not complied with the final consent decree. The appellants did not respond to the reopening of the case. The appellees then began discovery and renewed monitoring the appellants' compliance with the consent judgment.

In June 1988, after a hearing, the

district court imposed sanctions on the appellants for failure to comply with an order to compel discovery and answer interrogatories. The court also found the appellants to be in noncompliance with the final consent judgment and ordered a reinstitution of the formal monitoring process for a period of one year. The appellants neither sought rehearing nor appealed this ruling.

1990 to Present

In January 1990, the appellees filed a monitoring report, and, in February 1990, they filed a motion for an order finding the appellants in noncompliance with the consent judgment and for appointment of a special independent master or monitor. The monitoring report showed that the appellants failed to

implement parole guidelines as required by the consent decree.

In March 1990, the appellants filed another motion to vacate the final consent judgment and dismiss the action. The appellants again asserted that the court lacked jurisdiction to enter the final order and that it was void as a matter of law. The appellants' motion sought, alternatively, to modify the consent order to reflect the state statutory changes that had occurred since the consent decree was entered. The appellants based their motion on Rule 60(b)(4), Fed. R. Civ. P., for lack of jurisdiction, and Rule 60(b)(5), Fed. R. Civ. P., for modification of the consent judgment.

In May 1990, the district court entered an order specifically finding that it had jurisdiction and granting one

modification to the consent decree in order to comport with the timeliness standards of Michigan Compiled Laws Annotated (M.C.L.A.) § 791.235(1).[1] The court denied the appellants' motion to vacate and dismiss the action. Although it concluded that there was no liberty interest in the right to parole under the Michigan statute, the lower court found that the inmates have a liberty interest in the procedure. The court also ordered continued monitoring for one year, and thereafter appointed a U.S. Magistrate as the special master/independent monitor.

Both parties filed motions for rehearing, which were denied. Thereafter, both parties appealed.

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[1]The court denied the appellants' other requests for modifications to the consent decree.

II. Jurisdiction

The appellants' issue on appeal is whether the district court erred in denying their motion to vacate the consent judgment pursuant to Rule 60(b)(4), Fed. R. Civ. P., and to dismiss the action for lack of subject matter jurisdiction.[2]

The appellants argue that an inmate confined in the Michigan prison system does not have a constitutionally protected right to parole and that the consent decree could not create such a liberty interest. The appellants maintain that the district court acknowledged that there was no protectible right to parole and, therefore, erred by not vaca-

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[2]The appellants do not appeal the district court's denial of their other requests for modifications to the consent decree.

ting the consent decree, since it no longer had any basis to retain subject matter jurisdiction. Without jurisdiction, the consent judgment is void.

Futhermore, the appellants assert that it was error for the district court to impose procedures without first finding that a right to parole was created by the language of the Michigan parole statute. The Court notes two errors in this statement. First, the district court did not impose procedures upon the appellants. The district court merely enforced the provisions of the consent decree which the appellants voluntarily entered into before they presented it to

the court for its approval.[3] Second, the appellants continue to insist that the liberty interest involved here is the

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[3]The Supreme Court in Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522, 106 S.Ct. 3063, 3075, 92 L.Ed.2d 405, 423 (1986), stated: "Indeed, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. ... More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." (citations omitted).

right to parole.[4] The lower court on numerous occasions stated that the liberty interest involved is not in the right to parole, since none exists under

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[4]The appellants cite two Michigan Court of Appeals cases for the proposition that the Michigan parole statutory scheme does not create a liberty interest. We find both cases inapplicable. In Hurst v. Dep't of Corrections Parole Bd., 119 Mich. App. 25, 325 N.W.2d 615 (Mich. Ct. App. 1982), the court concluded that the early parole provision of the Michigan statute created only an expectation or hope of an early parole. Therefore, the court held that the statute did not create a right to parole. This is in accordance with our current views; however, it does not deal with a liberty interest in state-created procedures, which is the issue at hand. The court in Shields v. Dep't of Corrections, 128 Mich. App. 380, 340 N.W.2d 95 (Mich. Ct. App. 1983), ruled that the inmate who was provided with a parole hearing and informed of the reasons for denial of parole was afforded adequate due process. That case is not applicable because there the state adequately followed its procedures; whereas in the present case, the district court found the state to be in noncompliance with its procedures on numerous occasions.

the Greenholtz rationale, infra, but in the state-created procedures that make up the parole decision-making process. This is a fundamental element of this action, which should not be further mischaracterized.

The Supreme Court in Greenholtz concluded that a convicted person has no inherent constitutional right to parole. However, it stated that a court must look to the language of policies, statutes and regulations of the state to determine whether it has created any protectible rights. Further, this is to be decided on a case-by-case basis. 442 U.S. at 7-12, 99 S.Ct. at 2104-06, 60 L.Ed.2d at 675-79.

This was not a departure from its earlier holdings, in which the Supreme Court clearly ruled that protectible lib-

erty interests may arise from state-created statutes, regulations, rules and policies. See Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (Nebraska law established liberty interest in prisoners' good-time credits); Board of Pardons v. Allen, 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987) (Montana statute created a liberty interest in parole); Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (Nebraska statute conferred a protected interest in involuntary transfer to state mental hospital); Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) (Pennsylvania statutory framework gave rise to a liberty interest in remaining in the general prison population). But see Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49

L.Ed.2d 451 (1976) (Massachusetts law did not create a protected liberty interest in prison transfers); Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (Kentucky regulations did not establish a liberty interest in prison visitation).

The Sixth Circuit has followed the Supreme Court's rationale and has also recognized state-created interests protected by the Due Process Clause. See Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985), cert. denied, 474 U.S. 1054 (1986) (Michigan created a protected interest in prisoners receiving non-threatening books); Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977) (a federal prison in Michigan had policy statements that granted a liberty interest to prisoners in not having sanctions imposed on

them except upon a finding of major misconduct); Mayes v. Trammell, 751 F.2d 175 (6th Cir. 1984) (Tennessee's parole scheme created a liberty interest protected by the Due Process Clause), superseded sub. nom. Wright v. Trammel, 810 F.2d 589 (6th Cir. 1987) (subsequent amendment of Tennessee's parole statute mooted any liberty interest under the new statute).

In the instant case in 1978, Judge Feikens analyzed whether the State of Michigan granted a protectible liberty interest to inmates by mandating that the Parole Board follow certain procedures in the parole decision-making process. After analyzing Michigan's parole statutes (M.C.L.A. 791.232 et seq.) and MDOC regulations, Judge Feikens found that they created protectible constitutional

claims in favor of the appellees. He stated: "When, however, the state itself provides by statute or regulations that certain procedures be followed in determining whether or not an inmate is entitled to parole, independent liberty interests are created and the due process clause requires certain minimum procedures 'to ensure that the state-created right is not arbitrarily abrogated.'" August 1978 opinion (cited Meachum v. Fano and Wolff v. McDonnell, supra).

Judge Feikens also made clear that it was the statutory procedures and Parole Board regulations that created the liberty interest, not the decision whether to parole. He recognized that the Parole Board, after following the required procedures, reaches "its own conclusions on the desirability of releasing such

prisoner on parole by a majority vote. M.C.L.A. 791.235."[5]

In sum, although the Parole Board may have discretion in the eventual parole decision, the state, through statutes and regulations, has taken away any discretion in parole procedures. Therefore, the Michigan parole scheme is not wholly discretionary -- it limits the Parole Board's authority by requiring it to follow certain procedures. See, e.g., Walker, 558 F.2d at 1253-54; Spruytte,

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[5]We note that the cases upon which Judge Feikens relied in 1978 were the same cases upon which the Supreme Court relied for its decision in Greenholtz. Also, in its post-1979 decisions, the district court did not issue any opinions inconsistent with Greenholtz.

753 F.2d at 507-08.[6]

The appellants also argue that federal courts do not have jurisdiction to enforce procedures compelled or mandated by state law where there exists an ade-

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[6]In the hearing on this matter in 1990, Judge Taylor stated: "It's true, as defendants argue, that the release is a discretionary matter with the Commission. The pursuit of the appropriate procedures, however, in making the release determination is not discretionary, and the prisoners do have a liberty interest in that procedure being followed in each of their cases." Transcript, April 23, 1990.

quate available remedy under state law.[7] This is a curious argument for several reasons. The appellees are claiming a violation of their due process rights

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[7]Additionally, the appellants have raised an Eleventh Amendment defense to jurisdiction. The Eleventh Amendment prohibits a suit against a state when the state is the real party in interest. The case at hand seeks an injunction against state officials in their official capacities. The final consent decree is based on state law only to the extent that the state laws created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment. The consent decree is, in effect, an injunction granting prospective relief to the inmate class.

Relying upon Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Sixth Circuit has held that state officials may be sued in their official capacities for injunctive relief. Banas v. Dempsey, 742 F.2d 277 (6th Cir. 1984), aff'd, 474 U.S. 64 (1985); Freeman v. Michigan Dep't of State, 808 F.2d 1174 (6th Cir. 1987).

Therefore, the Eleventh Amendment is not a bar to the district court's jurisdiction over this action.

under the Constitution of the United States. The Supreme Court has ruled that a state-created liberty interest is entitled to the protection of the federal guarantee of due process. Vitek v. Jones, 445 U.S. at 490-91, 100 S.Ct. at 1262-63, 63 L.Ed.2d at 563-64 (1980), cited in Bossetta-Goodman v. Datacom Systems Corp., 644 F. Supp. 354, 358 (E.D. La. 1986), aff'd, 820 F.2d 1222 (1987). Therefore, a district court has jurisdiction to hear constitutional claims, such as those raised by the inmate class in the instant action.

Further, the remedy agreed to by both parties and presented to the court for its approval was the 1981 final consent judgment. By entering into the consent decree, the appellants waived their right to litigate the issues. The appellants

appear to be contradicting their original position of voluntarily settling this action with a consent decree in federal court by now asserting that available remedies existed under state law. In essence, the appellants are objecting to the enforcement of a remedy they selected. We find this argument untenable.

A federal court has jurisdiction to determine whether it has jurisdiction over the subject matter of an action. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376-78, 60 S.Ct. 317, 319-20, 84 L.Ed. 329, 334 (1940); Stoll v. Gottlieb, 305 U.S. 165, 171-72, 59 S.Ct. 134, 137, 83 L.Ed. 104, 108 (1938). "The rule has been that a court's determination that it has subject matter jurisdiction is res judicata of

the issue, if the jurisdictional question actually was litigated and expressly decided. . . . This is true even if the court is mistaken in its decision." 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3536 (1984) (citing Stoll v. Gottlieb, supra). This rule also applies if a party had an opportunity to contest subject matter jurisdiction and failed to do so. Chicot County, supra.

Although the doctrine of res judicata is not applicable here, since this is not a subsequent lawsuit, the district court in 1981 entered a final order in which it ruled that it had jurisdiction. Furthermore, the lack of subject matter jurisdiction was raised by the appellants in their 1984 motion to vacate and was rejected by the district court. In fact,

the appellants' arguments on this appeal are almost identical to those made in 1984. Yet, the appellants did not appeal the 1984 judgment. They maintain that an appeal would have been futile, since the jurisdiction of the court was specifically tied to the duration of the monitoring period and there were only two days left in the monitoring period when the court denied the appellants' motion to vacate. (On November 28, 1984, the court denied the motion to vacate and extended the monitoring period until December 1984).

Certainly, the appellants' claims of lack of jurisdiction have been considered and specifically ruled upon by the district court. The appellants did not appeal or request rehearing of the court's 1984 jurisdictional decision, nor

did they appeal the reopening of the action in 1987 or the 1988 finding of the appellants' noncompliance with the consent judgment.

Alternatively, the appellants assert that, if the district court did have jurisdiction over this action initially, it lapsed with the end of the initial monitoring period in June 1985. This is because the 1981 consent judgment provided for jurisdiction only during the monitoring period. However, "the court has an independent duty to ensure that the terms of the decree are effectuated since an approved consent decree is not merely a compact between former litigants but is a court order." 10 Cyclopedia of Federal Procedure, § 35.25 at 294 (3d ed. 1984) (citing Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982),

rev'd on other grounds sub. nom. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984)).

We have held that a case governed by a consent decree should not be closed when there are pending claims that the defendants have violated the decree. United States v. City of Cincinnati, 771 F.2d 161, 168-69 (6th Cir. 1985), cited in Youngblood v. Dalzell, 925 F.2d 954, 958 (6th Cir. 1991). Furthermore, the Supreme Court recently has held in an institutional reform action that the proper standard for deciding whether to dissolve a consent decree in a school desegregation case is whether the school district has complied in good faith with the decree since it was entered. The Court stated that the desegregation

decree at issue was not intended to rule in perpetuity, but was intended as a temporary measure to remedy past discrimination. Board of Educ. of Okla. City Public Schools v. Dowell, 498 U.S. ___, 111 S.Ct. 630, 636-38, 112 L.Ed.2d 715, 727-30 (1991).

In the district court's August 1987 order substituting counsel and reopening the action, the court ordered the appellees' substituted counsel to take all appropriate action, including reinstituting the monitoring period, required to enforce the court's consent judgment and to assure that the relief ordered by the court is provided for the inmate class. This order was brought about by a petition to enforce the judgment filed by a member of the inmate class, as well as dozens of letters from

Michigan inmates to the court alleging denials of due process as a result of the Parole Board's continued noncompliance with the 1981 consent judgment.

Although paragraph VIII(L) of the final consent decree sets a standard to govern termination of judicial supervision by tying it to the monitoring period, it was not error to reopen the action in light of claims that the appellants were violating the decree. Following Dowell, it is clear that the instant decree was not intended to operate in perpetuity, but that it is to be dissolved after the appellants have complied with it for a reasonable period of time. Id. Given the Supreme Court's recent guidance on this issue and the evidence in the record that the terms and purposes of the consent decree were not being met,

we are persuaded that judicial supervision was appropriate at that point.

It should be noted that this action was fully litigated in the district court. The parties voluntarily entered into a consent judgment to settle the action, and the court approved it. Consent judgments by their nature include compromises allowed by both parties, including waiving the right to litigate all the issues.[8] Therefore, the court never passed on the full merits of the action. However, the court did rule at the threshold that it had jurisdiction over the appellees' asserted constitutional claims. Thus, whether the appel-

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[8]For a more extensive discussion of consent decrees, see United States v. Armour & Co., 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed. 256 (1971).

lees' claims would have withstood an adjudication on the merits is unknown.[9] As the Supreme Court stated in Greenholtz, it is to be determined on a case-by-case basis.

Federal Rule of Civil Procedure 60(b)(4) provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void." However, "a judgment is not void merely because it

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[9]As Justice Cardozo stated in United States v. Swift & Co., 286 U.S. 106, 116-17, 52 S.Ct. 460, 463, 76 L.Ed. 999, 1007 (1932): "We do not turn aside to inquire whether [these claims] could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court."

is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter . . . ." United States v. Manos, 56 F.R.D. 655, 659 (S.D. Ohio 1972), cited in 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862 (1973); cf. Stoll, 305 U.S. at 171-72. "[I]f a court has the general power to adjudicate the issues in the class of suits to which the case belongs, then its interim orders and final judgments, whether right or wrong, are not subject to collateral attack so far as jurisdiction over the subject matter is concerned." 7 Moore's Federal Practice § 60.25[2] (discussing Rule 60(b)) (citing United States v. United Mine Workers of America, 330 U.S. 258, 289-94, 67 S.Ct. 677, 694-96, 91 L.Ed. 884, 911-13 (1947); Carter v. United

States, 135 F.2d 858, 861 (5th Cir. 1943)).

Here, the district court ab initio had subject matter jurisdiction to review asserted constitutional due process claims. Therefore, Rule 60(b)(4) is not applicable to void the consent judgment.

Accordingly, we affirm the district court's denial of the appellants' motion to vacate the consent decree and dismiss the action.

III. Modification

The appellees' issue on appeal is whether the district court erred by modifying a timeliness provision of the consent decree from "at least ninety days" to "at least thirty days," purportedly to comply with state law.

The final consent judgment originally

contained a provision that "[a]ll initial parole hearings shall be held at least ninety (90) days before a prisoner's earliest possible release date," with one exception. (Final consent judgment, § III(B)). The consent judgment states the purpose of the timeliness section: "A fairly administered parole process requires prompt hearings, prompt decisions, and prompt implementation of those decisions." (Final consent judgment, § III(A)). Implicit in the fact that both parties consented to this provision is that the ninety-day provision was necessary to avoid untimely decisions and releases. The appellees state that the provision was included to allow the Parole Board time to decide whether to parole, and then implement any releases by the parole eligibility date. In other

words, one of the purposes of the decree is to release prisoners on time.

The modification changed the timeliness provision at § III(B) of the consent judgment to read identically to M.C.L.A. § 791.235(1). That statute provides that the Parole Board hearing shall be conducted at least one month before the earliest release date.

Judge Taylor based her modification decision upon this analysis: "So the Court is not justified in requiring that a hearing be held before the statute requires it to be held, and I must move the hearing requirement up to match the statutory requirement, and all time requirements must be identical to those of the statute." Transcript, April 23, 1990 (emphasis added). The court relied upon unidentified Supreme Court cases

since 1981[10] in reasoning that, since the liberty interest involved is in the statutory procedure and not the release date, the decree should conform to the statutory procedure. Id.

Therefore, the court granted the one timeliness modification and rejected the other requested modifications. At the same time, the court found the appellants in noncompliance with the decree and appointed a special master to monitor the appellants' actions.

The appellants' motion for modification was based upon Rule 60(b)(5), Fed. R. Civ. P., which provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or pro-

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[10]We are unable to determine the origin of this reasoning or point to any Supreme Court cases for guidance.

> ceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The Sixth Circuit set forth standards for a Rule 60(b) modification of a consent judgment in Stotts v. Memphis Fire Dep't, 679 F.2d 541, 560-62 (6th Cir. 1982), rev'd on other grounds sub. nom. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984). Those standards allow modification (1) when done in accordance with basic principles of contract law; (2) when the decree is void or no longer equitable; (3) when the circumstances of the case change; or (4) when a better appreciation of the facts in the light of experience indicates that the

decree is not properly adapted to accomplishing its purposes.

The appellees assert that none of these standards were demonstrated by the appellants or found by the court below. The standard of review of a court's ruling on a Rule 60(b) motion is abuse of discretion. Stotts, 679 F.2d at 561; Akers v. Ohio Dep't of Liquor Control, 902 F.2d 477, 479 (6th Cir. 1990).

Changed circumstances may include either a change of fact or a change of law. System Fed'n No. 91, Railway Employees Dep't v. Wright, 364 U.S. 642, 646-47, 81 S.Ct. 368, 371, 5 L.Ed.2d 349, 353 (1961); Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 527, 106 S.Ct. 3063, 3078, 92 L.Ed.2d 405, 426 (1986). In the present case, the appellants argued that there

had been a change in the Michigan statute concerning the timeliness provision. They also argued changed circumstances as a result of the 1982 amendments to the state parole statutes. We recognize that significant changes were made to the Michigan parole statutes in 1982, subsequent to the entry of the instant consent decree.[11] However, we take notice that the statute in question, M.C.L.A. 791.235(1), was not amended subsequent to the entry of the consent decree. In fact, the district court in 1984 denied this same request for modification. However, even though the statute was exactly the same

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[11]We understand that the parole statutory changes made since 1981 were designed to streamline the parole decision-making process and promote efficiency, which is consistent with the purpose of the consent judgment. See plaintiffs' monitoring report at 33-36.

in 1981 as it was in 1990, the district court granted a modification of the consent judgment to make it identical to the statute.

One of the first and most widely accepted standards for modifying consent decrees was set forth by the Supreme Court in United States v. Swift & Co., 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999, 1008 (1932). This was a commercial case in which Justice Cardozo stated: "Nothing less than a clear showing of grievious wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Id.

However, we have held that consent decrees relating to institutions are "fundamentally different" from those

between private parties. Heath v. DeCourcy, 888 F.2d 1105, 1109 (6th Cir. 1989). This is because these types of decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions. Broader judicial discretion to modify the parties' agreement is required so that the agreed upon solution to the problem giving rise to the litigation may be fine-tuned to accomplish its goal." Id.

Therefore, in the context of institutional reform litigation, such as the instant action, the standard for modification pursuant to Rule 60(b) is more relaxed. In Heath, we articulated the standard as follows:

> [T]he court need only identify a defect or deficiency in its original decree which impedes achieving its goal, either because experience has

> proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree. A modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties.

Id. at 1110.

However, even applying the more relaxed standard to this institutional action, the district court did not have sufficient reason for granting the modification. Certainly, state law regarding the timeliness of initial parole hearings had not changed. Furthermore, the "at least ninety days" language in the consent decree met the statute's "at least one month" requirement. The statute does not limit the timing of hearings to no more than thirty days prior to the earliest release date; rather, it requires

that hearings be held "at least one month" prior to that date. Although broader in scope than the statute, the original decree did not violate the statute. Therefore, the consent decree and the state statute were not in conflict.

The Supreme Court has held that a federal court may enter a consent decree that provides broader relief than the court could have awarded after a trial, as long as the decree does not conflict with or violate the statute upon which it is based. City of Cleveland, 478 U.S. at 524-28, 106 S.Ct. at 3076-78, 92 L.Ed.2d at 425-27. The Court distinguished two earlier cases, System Fed'n No. 91, Railway Employees Dep't v. Wright and Firefighters Local Union No. 1784 v. Stotts, supra, on the basis that in each

there was a conflict between the judicial decree and the underlying statute. City of Cleveland, 478 U.S. at 524-28, 106 S.Ct. at 3076-78, 92 L.Ed.2d at 425-27. Therefore, a consent judgment may be entered and enforced where it provides relief broader than the specific language of the statute at issue.

Consistent with this analysis, the Supreme Court in Firefighters Local Union No. 1784 stated:

> It is to be recalled that the "scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it" or by what "might have been written had the plaintiff established his factual claims and legal theories in litigation."

467 U.S. at 574, 104 S.Ct. at 2585, 81 L.Ed.2d at 496 (quoting United States v. Armour & Co., 402 U.S. 673, 681-82, 91

S.Ct. 1752, 1757, 29 L.Ed.2d 256, 263 (1971)).

Moreover, given the lower court's finding of noncompliance by the appellants, it is apparent that the purpose of the consent judgment and the continuing need for it have not abated. It is evident from the court's statements made during the hearing on this matter (see supra) that the court thought it compelled to modify the consent decree. It is in this respect that we hold the district court erred. Without a conflict between state law and the consent judgment, the court was not compelled to modify the decree. Therefore, we reject the district court's reasoning upon which the decision to modify was based.

In sum, there has been no change in the statutory timeliness requirement

regarding initial parole hearings since the consent decree was entered. Nor is the original purpose of the decree's timeliness requirements (to make the parole system work fairly and promptly) furthered in a more efficient way by the modification. In light of the preceding, there was no justification or sufficient basis for the lower court to grant a modification. Accordingly, we hold that the district court abused its discretion, and we reverse.

IV. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED in part and REVERSED in part. We REMAND the action to the district court for such further relief or other orders as may be appropriate, pending a showing of compli-

ance for a reasonable period of time with the terms of the final consent decree. At a reasonable time after the objectives of the consent decree have been achieved, the parties may move the court, on due notice, for dissolution of the decree.

DAVID A. NELSON, Circuit Judge, concurring. I concur in the judgment and in all but Part II of the court's opinion.

The district court's power to grant injunctive relief in this case was, at the outset, problematic. The complaint was drafted on the theory that the defendant officials were depriving parole-eligible inmates of "liberty" without due process of law, a circumstance that would have justified the granting of redress under 42 U.S.C. § 1983. The problem was that neither state law nor federal law

created any substantive right to the "liberty" that release on parole would represent. The district court tried to circumvent the problem, as has been noted, by holding that when the state required "that certain procedures be followed in determining whether or not an inmate is entitled to parole, independent liberty interests are created...." In the light of subsequent case law, it is safe to say that this analysis was almost certainly incorrect.

A state creates a protected liberty interest, as we now know, "by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (emphasis supplied). If state law requires officials to follow a prescribed procedure in exercising their discretion, it may well give rise

to rights enforceable in a state court, but it does not, by itself, create any constitutionally protected "liberty interest" a deprivation of which can be redressed in federal court. "[A]n expectation of receiving [a particular kind of] process is not, without more, a liberty interest protected by the Due Process Clause." Id. at 250, n. 12 Cf. Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 237 (6th Cir. 1991).

It is probably unfortunate that this case was permitted to go forward in a federal court. The defendants having accepted the federal court consent decree without reservation, however, I agree that the challenge to the court's jurisdiction comes too late.

The parties to a lawsuit cannot con-

fer subject matter jurisdiction on a court by agreement, of course, but this does not preclude the compromise of legitimate and substantial legal questions. It would not have been fanciful, a decade ago, to think that a federal court could exercise jurisdiction over the case at bar -- and the defendants chose to enter into a compromise under which the plaintiffs agreed to terms that the defendants thought they could live with, while the defendants acceded to the notion that the district court had jurisdiction. The defendants having thrown in the towel on the jurisdictional issue then, I am not persuaded that they must be allowed to retrieve the towel now.

I fully endorse this court's suggestion that the consent decree should be

dissolved once its objectives have been achieved. Mindful of the fact that it would have been preferable to let the state courts of Michigan handle enforcement of Michigan's procedural rules for dealing with the release of Michigan prisoners on parole, I venture to express the hope that dissolution of the decree will come sooner rather than later.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON, et al.

Plaintiffs,
vs.

Civil No. 77-72230
HON. ANNA DIGGS TAYLOR

ROBERT BROWN, JR., et al.

Defendants.
_____/

ORDER

At a session of said Court held in the City of Detroit, Michigan on this __ day of May 24, 1990.

PRESENT: THE HONORABLE ANNA DIGGS TAYLOR, U.S. DISTRICT JUDGE

Plaintiffs' having filed a Monitoring Report dated January 31, 1990 and a Motion for Order Finding Defendants in Non-Compliance With the Consent Judgment and for Appointment of a Special Independent Master or Monitor and Other Appro-

priate Relief dated February 2, 1990, and Defendants having filed a Motion to Dismiss dated March 16, 1990, and this Court having reviewed the pleadings and heard oral argument on April 23, 1990, IT IS HEREBY ORDERED THAT

1. Defendants' Motion to Dismiss based upon the lack of jurisdiction of this Court is hereby denied;

2. Relief requested by Defendants is granted in part. Sec. III (B) of the Consent Judgment providing that all hearings shall take place within ninety days of the first earliest release date is modified to require that the initial parole interview shall be held at least thirty days prior to the earliest release date consistent with MCLA Sec. 791.235(1);

3. Plaintiffs' Motion for Order

Finding Defendants' In Non-Compliance with the Consent Judgment is granted with the following specific relief:

A. Monitoring of compliance with the Consent Judgment will continue for twelve months from the entry of this Order in the manner set forth in the Consent Judgment or as otherwise further ordered by this Court;

B. All parole cases, hearings, decisions and orders processed by the defendants shall be included in the data compilations and summaries for monitoring to determine compliance with the Consent Judgment's timeliness requirements;

C. Based upon the stipulation of Plaintiffs, parole reviews and decisions without hearings shall be included in the data compilations concerning timeliness as set forth in the Consent Judgment;

D. Parole guidelines shall be implemented and compliance with the Consent Judgment shall be reached within the monitoring period described above;

E. Plaintiffs' request for a special master/independent monitor is hereby granted. The duties of said individual shall be to monitor compliance, ascertain compliance problems and to develop, draft and assist in the implementation of the parole guidelines within the monitoring period. If the parties are unable to agree to an individual to serve as a special master/independent monitor, the parties shall have five days from the entry of this Order to submit the names and background information of three individuals whom they wish appointed by the Court.

IT IS SO ORDERED.

/s/
HON. ANNA DIGGS TAYLOR

Approved as to form:

MARTIN A. GEER
Attorney for Plaintiffs

THOMAS KULICK
Assistant Attorney General
Attorney for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON, OSCAR PARTEE, AND JAMES SIKON, Individually and On Behalf of All Other Persons Similarly Situated,

Plaintiffs,

v

No. 77-72230
Hon. Anna Diggs Taylor

PERRY JOHNSON, Director of the Michigan Department of Corrections; LEONARD MCCONNEL, Chairman of the Parole Board of the State of Michigan; GORDON FULLER, HOWARD GROSSMAN, HONDON HARGROVE, DONALD THURSTON, DELORES TRIPP, and EDWARD TURNER-Members of the Parole Board of the State of Michigan,

Defendants.
_____/

FINAL ORDER: CONSOLIDATION OF OPINION, ORDER, AND CONSENT JUDGMENTS

Resolution of the contested issues in Sweeton v. Johnson has been through two

Partial Consent Judgments agreed upon by the parties and approved by the Court, and by an Opinion and Order of the Court on issues not included in the consent judgments. Specifically, the Court has entered judgments through the following steps:

1. Stipulation to the Entry of a Partial Consent Judgment, June 11, 1980.
2. Stipulation to the Modification and Entry of a Partial Consent Judgment, December 16, 1980.
3. Final Partial Consent Judgment (combining the Stipulations of June 11, 1980, and December 16, 1980), December 29, 1980).
4. Memorandum Opinion and Order, March 31, 1981.

This Final Order is a consolidation of the above documents.

It is hereby ordered that:

I. GENERAL

A. Pursuant to the statutes, rules, and policies which establish, define, and regulate the parole process, this process should be administered in an effective and fair manner, and afford each prisoner the rights to which he or she is entitled.

B. This Final Order is not intended to constitute an admission of liability by Defendants on those issues resolved by the Consent Judgments of June 11, 1980, and December 16, 1980.

II. INFORMATION

A. It is desirable that prisoners understand the parole process and their rights within this process. Prisoners will be provided information concerning

the parole process in order to permit them to participate more fully in the process and to more actively and responsibly plan for their futures.

B. The issuance of a parole information booklet will serve to increase this understanding.

C. Following are aspects of the parole information booklet:

1. The copy of the text of the parole information booklet is attached. See Attachment I. It shall be the responsibility of the Michigan Department of Corrections ("MDOC") to publish and distribute the booklet. See Section XI.
2. Included in the parole information booklet will be specific information about how to obtain access to a prisoner's file.

3. The parole information booklet shall be periodically updated to reflect changes in MDOC policy, and will be distributed to prisoners within 90 days after the approval of the change in policy by the Corrections Commission. For a period of 30 months after the signing of this Consent Judgment, any modification will be made with the advice and consent of Plaintiffs.

D. At the time that a prisoner's Parole Eligibility Report (PER) is prepared, the prisoner has the right to list individual(s) he or she does not want to act as spokesperson. The prisoner also has the right to add other names to this list subsequent to the preparation of the PER.

E. 1. No Resident Unit Manager

who has in the past written a negative PER about an inmate, or has been the subject of a lawsuit by him or her, shall prepare that inmate's PER if the inmate objects to the RUM preparing the PER.

2. If the entire Resident Unit Staff would be disqualified from preparing a PER under this section, then the available staff may prepare the PER.

3. Resident Unit Staff preparing a PER under the circumstances outlined in Section 2 shall not include a parole release recommendation in the PER unless such

a recommendation is requested by the inmate. The Parole Recommendation Statement shall read:

"The PER preparer offers no recommendation for or against parole."

F. MDOC policy will be amended to reflect this agreement as soon as possible, consistent with provisions of the Michigan Administrative Procedures Act (APA).

III. TIMELINESS

A. A fairly administered parole process requires prompt hearings, prompt decisions, and prompt implementation of those decisions.

B. All initial parole hearings shall be held at least ninety (90) days before

a prisoner's earliest possible release date, except for those prisoners in community status programs. In those cases, hearings shall be held at least thirty (30) days before the earliest possible release date.

C. The PER will be prepared at least ninety (90) days in advance of the official date on all twelve (12) month continuances.

D. Whenever it appears that a timely hearing has not been scheduled or held, for whatever reason, a hearing shall be held within forty-five (45) days of the date that the information concerning the missed hearing is received by the Parole Board.

E. If, for any reason, a parole hearing is not held in a timely manner, and the prisoner is subsequently con-

tinued, then the date set for that prisoner's next parole hearing shall be set as if the original hearing had been held in a timely manner.

F. Whenever a rehearing is required by policy, that rehearing will be scheduled within 45 days of the date of the receipt of the new information by the Board.

In all cases, the notice provided to the inmate shall contain a statement of the reasons for the rehearing, and the inmate shall be provided with a copy (or a summary, if the original material is exempt from disclosure) of any new evidence upon which a rehearing is based.

An inmate shall have the option of waiving notice and/or receipt of copies of new materials or evidence prior to a rehearing in cases where an immediate

rehearing can be scheduled in a period of time shorter than that necessary to provide notice or obtain copies of the new material, but such waiver shall not prevent a prisoner from subsequently obtaining such materials and/or evidence (or a summary, if the original material is exempt from disclosure).

G. Deferrals to secure additional information are to be avoided.

H. Policy Directive PD-DWA-45.11, which deals with Parole Eligibility Reports (PER), will be modified to reflect that all reports required pursuant to a policy directive shall be requested by the PER preparer at the time the PER is being prepared. PD-DWA-45.11 shall further make the PER preparer responsible for monitoring requests for such reports to insure their timely

receipt and placement in an inmate's file prior to the parole hearing. A check-box list shall be developed to aid the PER preparer in making and monitoring these requests.

Policy will be modified to require the PER preparer to request additional reports in the circumstances described in Attachment II.

I. For any report ordered by the Parole Board at a hearing, the following deadlines shall prevail:

In cases where the report originates within the MDOC, the report shall be prepared and communicated to the Parole Board within thirty (30) days of the hearing. In cases involving the securing and obtaining of Psychological Reports, the report shall be prepared and communicated to the Parole Board within forty-

five (45) days of the hearing. It shall be the responsibility of the MDOC Director's Office to see that all bureaus and offices comply with this deadline.

In cases where the report is from non-MDOC sources, the Parole Board shall request that it be furnished within thirty (30) days of the prisoner's hearing date.

In all cases, should the report not be received by the Parole Board within thirty (30) days, the Parole Board shall communicate with the source of the report and remind them to submit the report.

J. Whenever a "No Fixed Date" ("NFD") release is ordered, it shall be the responsibility of the MDOC to implement that release within thirty (30) days.

K. A prisoner may inform the Parole

Board of its failure to meet a timeliness requirement concerning scheduling a hearing, reporting the final decision from a hearing, or carrying out an ordered release, by sending the Department a Parole Reminder Form, Attachment III. These forms shall be made readily available to all prisoners in their housing units.

1. In the event that the Parole Board discovers that a hearing has not been held in a timely manner, then the provisions of Section III-D shall shall control.
2. In the event that the Parole Board discovers that a final decision has not been timely made, then the Board shall report a final decision within 20 days of the date the Parole Reminder Form is received by the

Parole Board.

3. In the event that the Parole Board discovers that a timely release has not been effected, the Board shall act with Michigan Department of Corrections to effect release within twenty (20) days of the date the Parole Reminder Form is received by the Parole Board.

L. A final decision to parole or continue an inmate shall be reached by the Board and communicated to the inmate at least thirty (30) days before the inmate's minimum release date or official date, except for those inmates in community programs. In community program cases, every effort will be made to inform the inmate of a final decision at the time of hearing. However, if the Board is unable to reach a final decision

at the time of hearing for a community program inmate, a final decision to parole or continue parole shall be reached and communicated to the inmate before the inmate's minimum release date or official date.

M. The MDOC and the Parole Board shall be deemed to be in substantial compliance with each segment of the timeliness deadlines of Section III unless it appears that these timeliness provisions are violated in over 5% of the cases before the Board for that segment. Section III M of this agreement is not intended to relieve the MDOC from its responsibility to remedy timeliness errors in individual parole release cases.

N. MDOC policy will be modified to reflect this agreement as soon as possi-

ble consistent with the provisions of the Michigan APA.

IV. REHEARINGS

A. Whenever the Board receives any communication concerning a prisoner after a Board action, and that information is considered in the Board's decision to continue a prisoner, or to suspend a decision of the Board granting parole, or in any other decision by the Board which will delay the inmate's release on parole over 45 days, the prisoner shall be entitled to a rehearing within forty-five (45) days from the date the Board receives the information. This rehearing shall be scheduled by the Board, without the necessity of request by the prisoner. The prisoner shall receive notice of this rehearing in accordance with the proce-

dure in Section III F of this agreement.

B. Whenever an inmate grieves an action or procedure of the Board, and that grievance is upheld, then, within forty-five (45) days of the grievance decision, that decision shall be implemented.

C. MDOC policy will be modified to reflect this agreement as soon as possible consistent with the Michigan APA.

V. FACTORS AND CRITERIA

A. The fair administration of the parole process requires that the Parole Board shall disclose to an inmate the reasons for any denial of parole and that whenever possible, the Board shall inform the inmate of actions he or she can take to advance his or her chances for a future parole.

B. The Parole Board shall be guided by the following principles in making parole release decisions:

1. A prisoner will be granted a parole upon the expiration of his minimum sentence, less regular and special good time where applicable, unless a majority of the Board reasonably believes that this release on parole would constitute a menace to society or to the public safety. The Parole Board's decision to grant or deny parole is subject to the conditions set forth in sub-paragraph 4, below.
2. Institutional misconduct will be considered in making a parole release decision only when the misconduct reasonably reflects an expectation that the prisoner will be a menace to society or to the public safety.

3. Until such time as the criteria referred to in Section V C are developed, the Parole Board shall utilize the factors set forth in Administrative Rule 715 (R791-7715) in making their decision whether to grant or deny a parole. Factors relied upon will be indicated in the statement setting forth the reason(s) for denial of parole.

4. Nothing herein is intended to alter, modify, divest, or otherwise limit the rights and duties which the Legislature has provided to the Parole Board within the parole decision-making process.

C. The MDOC shall develop objective criteria to assist Parole Board members in determining whether an individual is a threat to society. Plaintiffs will be

permitted to assist the MDOC by providing input in the development of these factors and will be kept informed of the factor development process.

D. In developing these criteria, the Parole Board shall, to the greatest extent possible, rely on factors within the control of the inmate.

E. In notifying an inmate that parole is denied, the Board shall, in specific, objective language, inform the inmate of the reasons for that denial. Mere repetition of the explanation contained in the Parole Board Action Summary Number Code does not constitute an adequate statement of reasons for the denial of parole.

F. When notifying an inmate that parole is denied, the Board shall, whenever possible, provide the inmate with

suggested actions which will enhance or ensure the chance of a future parole.

G. MDOC policy will be modified to reflect this agreement as soon as possible consistent with the Michigan APA.

H. The Board shall discuss the nature and circumstances of the crime or crimes with the inmate at the initial parole release interview.

VI. THE ROLE OF THE RESIDENT UNIT STAFF IN THE PAROLE PROCESS

A. Resident Unit Staff will be of assistance to inmates in the parole process by explaining the process to inmates and by assisting inmates in solving problems in that process.

B. Resident Unit Staff will have the following responsibilities in the parole process:

1. Explaining the parole process to prisoners.
2. Detecting and correcting errors in parole procedures and in records.
3. Discussing the parole hearing with the prisoner, and presenting information to the Board for or with the inmate upon request of the inmate.
4. Preparing and distributing the Parole Eligibility Report (PER), and assuring that all relevant policy-required documents are included in the prisoner's file.

C. In order to assist Resident Unit Staff in carrying out their responsibilities as spokespersons, additional staff training will be provided. This training will be developed by Defendants, with the advice and assistance of Plaintiffs. This training will include material on

the following topics:

1. Explanation of parole and good-time.
2. An overview of the parole hearing process.
3. An explanation of the role of the Resident Unit Staff in the parole process.
4. Training on how to prepare a PER.
5. Training concerning ordering and obtaining necessary reports.
6. Training concerning correcting errors in inmates' files.
7. Training on the spokesperson's role at a parole release hearing.
8. Training on counseling inmates and on commonly raised questions about parole.
9. Training in the use of the Parole Reminder Form and the Parole Board Inquiry Form.

D. Defendants, with the advice and assistance of Plaintiffs, will develop policy directives or memoranda necessary to instruct ongoing Resident Unit Staff in their responsibilities in the parole process.

E. The training described in paragraph C above, will be included in the Department's Resident Unit Staff new staff orientation and training program. Defendants will provide adequate time to parole training in this program. The parties anticipate that approximately eight hours will be necessary for this training.

F. Whenever possible, ongoing Resident Unit Staff shall be included in the parole process training program provided for new staff.

G. Whenever possible, Defendants

will provide parole process training to ongoing staff through staff meetings or education sessions, in addition to the instructional memoranda described in paragraph D above.

H. MDOC policy will be modified to reflect this agreement as soon as possible consistent with the Michigan APA.

VII. PRISONERS SENTENCED TO LIFE IMPRISONMENT

A. Each inmate sentenced to life imprisonment and within the scope of M.C.L.A. §791.234(4) shall be brought before the Board for a parole release hearing as soon as is feasible after the inmate has served seven calendar years on his sentence. The inmate shall be re-interviewed by the Board at no greater than 36-month intervals after the initial

parole hearing.

B. All other provisions of MDOC policy relating to parole release shall apply to inmates considered under this section.

C. Each inmate sentenced to life imprisonment for whom pardon or commutation is necessary for release from confinement shall have a public hearing within a reasonable time, not to exceed 90 days, following the recommendation for pardon by the Parole Board.

VIII. ENFORCEMENT AND MONITORING

A. In order to detect and prevent procedural errors in the parole process, mechanisms must be developed to monitor that process. The primary responsibility for coordination of the parole process and the prevention of widespread errors

rests with the MDOC, through its Director's office. To assure compliance with the specific mandates of this Order, Defendants will make relevant MDOC records available to Plaintiffs, including any non-exempt records of selected inmates' files.

B. All administrative rules, policy directives, memoranda, and other documents containing statements of general application to the parole process shall be provided to Plaintiffs. Plaintiffs shall object to any policy or rule of general application inconsistent with the terms of this Order.

C. Parole Reminder Forms, Parole Board Inquiry Forms, and the grievance procedure shall exist to resolve inmates' complaints about the parole process. To monitor these systems, Plaintiffs will be

provided with a summary of the number and type of complaints handled by each system. Upon request, Plaintiffs will be permitted to inspect and copy individual complaints from each of these systems. The summaries of inmate complaints from the Reminder Forms, Inquiry Forms, and grievances will be provided to Plaintiffs' attorneys at three-month intervals during the pendency of this decree.

D. Defendants agree to implement the rehearing process as described in Section IV of this Order. To assure compliance, Defendants will log the rehearings ordered by the Board, with a short explanation of the reason for the rehearing. Plaintiffs will be provided with copies of these logs at three-month intervals during the pendency of this decree.

E. Defendants agree to assure that

Parole Board Action Sheets and Parole Board Work Sheets shall contain no inflammatory statements, shall state the reason for the denial of the parole, and shall provide the prisoner with advice for securing parole in the future. To this end, Defendants shall provide Plaintiffs with a sample of 20 recent continuances by each Parole Board member with worksheets attached. Plaintiffs shall comment to each Board member on these continuances, with recommendations on how to prevent non-informative or inflammatory action sheets. This review will be repeated at three-month intervals during the pendency of this decree.

F. Parole information booklets, Parole Reminder Forms, and Parole Eligibility Reports will be prepared and distributed to prisoners. Defendants

will develop a method of recordkeeping which reflects the date of receipt of each of these items. The parties will work together to develop a method of monitoring MDOC performance in this area. Plaintiffs may develop a questionnaire or file review method of assuring proper delivery of these items. If they do so, Defendants will provide them with sufficient access to non-exempt MDOC records to permit them to monitor MDOC performance in these areas.

G. Resident Unit Spokespersons shall be trained to assist inmates in the parole process, including prisoners' rights relative to the parole process. To monitor the training and performance of spokespersons: (1) Plaintiffs will participate in the planning of and be informed of the parole training for both

ongoing and newly-hired and promoted Resident Unit Staff; Plaintiffs may arrange, upon request, to view MDOC parole process training; (2) Plaintiffs' attorneys may arrange, upon request, to view specific or random parole release hearings.

H. PER's will be prepared and distributed at least 30 days before parole release hearings. The parties agree that policy-required reports will be included in the inmate's file, along with other materials and documents the inmate deems relevant and/or beneficial to a just decision, before parole release hearings. Plaintiffs' attorneys shall be permitted access to MDOC and Parole Board records in order that they may monitor MDOC compliance in this area.

I. The parties shall develop a com-

puter program method of monitoring the timeliness of parole hearings, of final parole decisions, and of releases. This program shall include information on all parole release hearings, decisions, and releases for each category, including cases where a final decision is made at hearing and cases where a final decision is deferred. This program shall include a mechanism for accounting for cases which are in the system (with no final decision or release) at the end of a reporting interval. This program shall include sub-categories for the exceptions of the general timeliness standards recognized in this Order. This program shall be in operation on or before September 1, 1980. The reports generated by this monitoring system shall be provided to Plaintiffs monthly, unless the

parties agree that a longer report period more efficiently describes case activity or unless Defendants demonstrate significant cost savings by submitting the reports at three-month intervals.

J. In order to detect and correct errors in the parole process, there shall exist:

1. A Parole Reminder Form, as described in § III K above, and attached, which will permit an inmate to bring to the attention of the Board any missed deadline in holding a parole hearing, making a final decision as a result of parole hearing, or effecting a release.
2. A Parole Board Inquiry Form, which will permit an inmate, through his or her counselor, to bring directly to the attention of the Board any ques-

tion concerning the processing of that inmate's parole.

3. The MDOC grievance process, which permits an inmate to question the propriety of departmental actions through a review of the action by institutional staff and the MDOC administration.

K. The parties shall undertake such further steps as necessary to assure that the parole process is in accord with law and policy by monitoring specific aspects of the parole process.

L. Plaintiffs' participation in monitoring described in this section shall continue for 30 months, unless the Court extends this period for good cause shown. The Court shall retain jurisdiction of this cause for the pendency of this monitoring period, and shall have the power

to make further orders consistent with this decree.

M. MDOC policy shall be modified to reflect this agreement as soon as possible consistent with the Michigan APA.

IX. MATERIAL SUBMITTED TO THE BOARD

A. A prisoner shall have the right to bring to the attention of the Board any material s/he deems relevant to parole consideration. Such material shall be included in the prisoner's file upon request.

X. INMATE ACCESS TO FILES

A. The procedures through which inmates gain access to MDOC records, including prisoner files, are defined by the Michigan Freedom of Information Act.

B. Inmates who face the Parole Board

are entitled to know the information upon which Parole Board members will make their decision. Inmate requests for access to files which are understandable to an average person must be complied with by the MDOC.

C. Copy Access to Central Office Files. Requests to obtain copies of documents from the Central Office file need only be descriptive enough to sufficiently enable the public agency to find the public record. Inmate requests for "my file," "all the documents in my file," or the like, shall be complied with in full, by prompt provision of copies of all non-exempt documents found in the file. Subsequent similar requests shall be met by the provision of all non-exempt documents in the file which came into the file since the last request.

D. Physical Access to Central Office Files. The Department is not required to transport inmates to Lansing or to transport Central Office Files to the institutions in order to provide inmates physical access to these Files. However, an inmate may designate a representative who may inspect, review, and/or obtain copies of non-exempt documents contained in Central Office Files. Such representative shall present a signed, written release before inspection, review, or receipt of copies.

E. Copy Access to Institutional Files. Requests for copies from institutional files shall be handled in the same manner as ordered for copy access to Central Office files. That is, copies of documents contained in institutional files shall be provided to inmates upon a

request which permits the MDOC to identify the request.

F. Physical inspection of Institutional Files may not be restricted by harsh limitations to annual or bi-annual inspections, which are unreasonable. Inmates should be allowed to inspect or obtain copies from the Institutional File or any documents added since their last inspections, no matter how near in time. Any arbitrary limitation on the number of times during a year a file may be inspected cannot stand.

G. The MDOC may provide copy access to institutional files for inmates in segregation or otherwise separated from the main population for disciplinary reasons under separate procedures.

H. Limits on the amount of time for study of file materials are arbitrary and

may not be maintained; but prison authorities can exercise reasonable discretion to insure that inmates examining files are not taking advantage of this ability to spend undue amounts of time away from other required activities.

I. Requests for copies or for physical inspection shall be promptly answered within a five-day response period.

J. The Department shall disclose records to inmates according to the procedures and time limits of the Michigan Freedom of Information Act, except those records specifically exempted under § 13 of the Act. In applying the Act, there is a presumption in favor of disclosure of all Department records and the exemptions contained in § 13 shall be narrowly construed. In general, only those documents whose disclosure would pose a seri-

ous risk of harm to the inmate or others, or invasion of another's privacy should be exempt from disclosure.

K. Nothing in this Order should be construed to invalidate or render unnecessary those parts of Defendants' current policies which are designed to protect inmate's right of access.

L. Monitoring of compliance with the file access aspects of this Order shall be conducted by Plaintiff's counsel for a period of six months from the date of entry of this Order. Defendant shall implement a log process for FOIA requests essentially similar to the present Central Office log process at each institution by July 1, 1981. Defendants shall send to Plaintiff's counsel copies of their FOIA request log sheets for each institution and the Central Office during

a six month monitoring period. Plaintiff's counsel will be permitted access upon request to inspect and receive copies of individual FOIA requests and responses at the MDOC Central Office or at any MDOC institution. Defendants shall send to Plaintiff's counsel, on a monthly basis, during the monitoring period, copies of all form FOIA denials generated by Defendant's Central Office word processing equipment.

M. MDOC policy will be modified to reflect this Order as soon as possible and consistent with the Michigan APA.

XI. DISTRIBUTION OF PAROLE INFORMATION BOOKLET

A. The parole information booklet, as defined in § II, shall be distributed as follows:

1. The parcle information booklet shall be included as a section of the Resident Guide Book which is given to each inmate upon entering the corrections system.

2. The parole information booklet also shall be distributed as a separate booklet to inmates at the time they begin the parole process, that is, at the inmate's initial meeting with a counselor to begin preparation of the Parole Eligibility Report (PER).

DATED: 28 Aug 1981

/s/
JUDGE ANNA DIGGS-TAYLOR

Approved by:

WAYNE COUNTY NEIGHBORHOOD
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(313) 962 9015

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WILLIAM H. GOODMAN (P 14173)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON, et al.,

Plaintiffs,

v

PERRY JOHNSON, et al.,

Defendants.
_____/

Civil Action
No. 77-72230
Honorable Anna
Diggs-Taylor

AMENDMENT OF FINAL ORDER

At a session of said Court held in the City of Detroit, County of Wayne, on the 10th day of August, 1981.

PRESENT: Honorable Anna Diggs-Taylor
U.S. District Judge

Upon the reading and filing of the Stipulation and Agreement entered into by both parties and approved by the Court and the Court being fully advised on the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED

AND ADJUDGED that the Final Order, heretofore entered in this cause on March 31, 1981 be and is hereby Amended as follows:

1. The Michigan Freedom of Information Act, MCLA 15.231 et seq; MSA 4.1808(1) et seq does not, in and of itself, create a constitutional due process right of access to prisoner records giving rise to a cause of action enforceable under 42 USC § 1983.

2. Plaintiffs' claim of access to prisoner records, originally brought pursuant to 42 USC § 1983, is now treated as a pendent state claim arising under the Michigan Freedom of Information Act and further, said claim was litigated upon cross Motions for Summary Judgment and upon which Plaintiffs substantially prevailed.

3. The rights set forth in Part X

of the Final Order entered in this cause are rights recognized by and secured to Plaintiffs under state law.

4. The stipulation amending the Court's order, and the Court's order approving this stipulation shall not become final until 60 days from the date of entry of the Court's order approving the stipulation. Within this 60 day period:

Defendants shall promptly effect notice to class of this proposed settlement through posting the attached notice in all institutions and by publication in the penal press. This notice shall be effected within 30 days.

If the Court receives no response objecting to this stipulation and order from any class member within 60 days from the date of entry of the Court's order

approving the stipulation, the order shall become final automatically.

If, however, the Court receives any response from any class member within 60 days objecting to any provision of this order, the Court will consider such objections and, in its discretion, grant final approval to the stipulation and order or schedule a hearing for considerations of the objections.

DATED: 28 Aug 1981 (s)
JUDGE ANNA DIGGS-TAYLOR

BY: /s/
ROBERT F. GILLET (P 29119)

BY: /s/
JUDITH MAGID (P 24525)

BY: /s/
WILLIAM H. GOODMAN (P 14173)

BY: /s/
Thomas M. Loeb (P 25913)

BY: /s/
Mark I. Leach (P 24343)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON, OSCAR PARTEE, JAMES SIKON, STEVEN GODFREY, DONALD R. JONES, MICHAEL WDOWYN, JR., JOHNNIE HENDERSON, AND RONALD SHELBY, Individually and on Behalf of All Other Persons Similarly Situtated,

Plaintiffs,

v.

CIVIL ACTION NO: 7-72230

PERRY JOHNSON, Director of the Michigan Department of Corrections; LEONARD MCCONNELL, Chairman of the Parole Board of the State of Michigan; GORDON FULLER, HOWARD GROSSMAN, HONDON HARGROVE, DONALD THURSTON, DELORES TRIPP and EDWARD TURNER, Members of the Parole Board of the State of Michigan.

Defendants.
_____/

OPINION

Plaintiffs are inmates at the Southern Michigan State Prison who seek

injunctive and declaratory relief individually and on behalf of all other inmates of Michigan penal institutions who are similarly situated. They claim that the policies and procedures employed by the state in deciding whether or not to grant parole deny them their rights to due process of law as secured by the Fourteenth Amendment to the United States Constitution. They also claim that the procedures employed by the members of the Parole Board violate the Michigan Administrative Procedures Act and relevant Parole Board and Department of Corrections regulations.

Plaintiffs filed a motion seeking certification as a class. Defendants opposed that motion and in a motion supported by extensive affidavits and exhibits, seek dismissal or in the alter-

native summary judgment. Pursuant to my letter on May 26, 1978, the motion for class certification has been held in abeyance while the motion to dismiss or in the alternative for summary judgment was being considered.

Defendants' motion to dismiss is granted as to the claims raised under the United States Constitution, but the alternative motions are denied as to the claim that the state is not complying with its own statutes and regulations.

I.

The question of which of the requirements of due process under the Fourteenth Amendment, if any, are applicable to parole release proceedings has been the subject of considerable litigation in the past few years. See cases cited in Scott

v. Ketucky Parole Board, 429 U.S. 60, 61, n.1 (1976). This litigation has produced a split among the circuit courts of appeal. Scott, at 61, n.1; compare, e.g. Williams v. Ward, 556 F.2d 1143, 1158 (2d Cir. 1977) ("It has been settled in this Circuit since 1974 that the interest of an inmate in a parole release decision is subject to some due process protections.") with Scarpa v. U.S. Board of Parole, 477 F.2d 278, 282 (5th Cir. 1973) (Finding no deprivation of a protected interest) and Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976). cert. denied, 429 U.S. 917 (1976) (Due process does not apply to parole eligibility process.) It appears that the decisions of the U.S. Court of Appeals for the Sixth Circuit are in agreement with the holding of the Fifth Circuit in Scarpa

and Brown, that an inmate has no constitutionally protected interest in a parole release decision.

On January 15, 1975 the Sixth Circuit entered an order in Scott v. Kentucky Parole Board, No. 74-1899. In that case the plaintiffs were "seeking a determination that parole release procedures of the Kentucky Parole Board failed to conform to the minimum guarantees under the due process clause of the Fourteenth Amendment of the United States Constitution." Id., at 1. The district court had dismissed the complaint, and the court of appeals affirmed that dismissal stating that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution." Id., at 2.

The United States Supreme Court

granted certiorari, but merely vacated the judgment of the court of appeals and remanded for consideration of mootness. Scott v. Kentucky Parole Board, 429 U.S. 60 (1976). Justice Stevens dissented from the Court's decision, and in his dissent he summarized the holding of the court of appeals to be that "the requirements of due process are not applicable to parole release hearings." Id., at 61, n.1.

On remand the Sixth Circuit held that the case was not moot, but restated its previous holding that no violations of rights guaranteed by the United States Constitution had been alleged and again affirmed the district court's dismissal. Scott v. Kentucky Parole Board, 556 F.2d 805 (6th Cir. 1977). Certiorari was denied on November 14, 1977. 98 S.Ct.

492.

Prior to its consideration of Scott, the Supreme Court had an opportunity in Meachum v. Fano, 423 U.S. 215 (1976), to consider the related question of whether or not there is a due process right to a hearing prior to a prison transfer. The Court stated:

> Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States. Preiser v. Rodriquez, 411 U.S. 475, 491-492 (1973); Cruz v. Beto, 405 U.S. 319, 321 (1972); Johnson v. Avery, 393 U.S. 483, 486 (1969). The individual States, of course, are free to follow another course, whether by statute, by rule or regulation, or by interpretation of their own constitutions. They may thus decide that prudent prison administration requires pre-

> transfer hearings. Our holding is that the Due Process Clause does not impose a nationwide rule mandating transfer hearings. Id., at 228-229.

The Court recognized that the record of such a transfer might affect the possibilities of parole, but stated that due process requirements have not been held applicable to the parole release decision making process.

> Nor do we think the situation is substantially different because a record will be made of the transfer and the reasons which underlay it, thus perhaps affecting the future conditions of confinement, including the possibilities of parole. The granting of parole has itself not yet been deemed a function to which due process requirements are applicable. See Scott v. Kentucky Parole Baord, No. 74-6438, cert. granted, 423 U.S. 1031 (1975). Id., n.8.

Nor has the Supreme Court subsequently held that parole release proceedings must be accompanied by due process

procedural safeguards. On October 17, 1977, at 434 U.S. 910, certiorari was denied in Scott v. Williams, No. 76-6612 and Lay v. Williams, No. 76-6858. Justice White, who was joined by Justice Brennan, wrote a dissent describing these two cases as follows:

> These two cases raise once again the question of whether parole release determinations implicate an interest in liberty entitled to protection under the Due Process Clause of the Fourteenth Amendment. Petitioners in both cases contend that the Oklahoma Pardon and Parole Board acted unconstitutionally in denying them parole without affording them an opportunity to appear personally before the Board and providing them with reasons for its decision. The Oklahoma Court of Criminal Appeals denied relief.
> 434 U.S. at 910.

The foregoing statements and actions in the United States Supreme Court and the U.S. Court of Appeals for the Sixth Circuit establish the proposition that,

in this circuit at least, the requirements of due process are not applicable to parole release hearings. Accordingly, defendants' motion to dismiss for failure to state a claim upon which relief can be granted is granted as to plaintiffs' claims that the procedures employed by the State of Michigan violate their rights to due process under the United States Constitution.

II.

The first section of this opinion dealt with what due process rights plaintiff inmates have directly under the United States Constitution. When, however, the state itself provides by statute or regulations that certain procedures be followed in determining whether or not an inmate is entitled to

parole, independent liberty interests are created and the due process clause requires certain minimum procedures "'to ensure that the state-created right is not arbitrarily abrogated.'" Meachum v. Fano, supra at 226, quoting Wolff v. McDonnell, 418 U.S. 539, 557 (1972).

Perry v. Sindermann, 408 U.S. 593 (1972), and Board of Regents v. Roth, 408 U.S. 564 (1972) establish that a property interest subject to due process protection is one within

> a broad range of interests that are secured by "existing rules or understandings." [Roth] at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. Perry, supra at 601.

Wolff v. McDonnell, supra, 418 U.S. at 557-58, establishes that the analysis

of liberty interests is parallel to the property interests and can be created by rules or mutually explicit understandings. In Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977) the Sixth Circuit held that prison policy statements gave inmates a liberty interest in having certain minimum due process safeguards observed in disciplinary proceedings. The court goes to considerable length to show that this interest would not exist in the absence of such prison policy statements. Id., at 1256.

Several courts of appeal have applied this analysis to a parole release proceedings and required that the parole granting authorities follow their own regulations. See, e.g., Burton v. Ciccone, 484 F.2d 1322 (8th Cir. 1973); Franklin v. Shields, 569 F.2d 784 (4th

Cir. en banc 1978), cert. denied, 98 S.Ct. 1659 (1978).

The Michigan Department of Corrections rules were filed with the Secretary of State subsequent to the filing of the complaint and plaintiffs have withdrawn their claim that the regulations were not promulgated in accordance with the Michigan Administrative Procedures Act.

The Michigan parole system is generally empowered and operates under a Michigan statute, M.C.L.A. 791.232 et seq. This statute sets out certain procedures that the Parole Board must follow and requires that at least one month prior to the expiration of the minimum term of each prisoner eligible for parole that the prisoner and all pertinent information about him be brought before the Board. The Board is then to reach

its own conclusions on the desirability of releasing such prisoner on parole by a majority vote. M.C.L.A. 791.235. Parole Board regulations require that prisoners have access to their files, an opportunity to make statements on their own behalf, and an opportunity to challenge the truth or relevance of any material submitted to the Parole Board. The Board's regulations also require written summaries of Board actions, a statement of the reasons for those actions, and specification of any conditions to be met during a passover period. Having established these procedures by statute and Corrections Department regulations, the state cannot ignore or violate them without abrogating a prisoner's rights. Walker v. Hughes, supra; Wolff v. McDonnell, supra. Consequently, defen-

dants' motion to dismiss is denied as to the claim that the state did not comply with its own statutes and regulation in deciding whether or not to grant parole release to plaintiffs.

Defendants' motion for summary judgment on this claim is also denied because there are genuine issues of material fact that remain to be resolved. Defendants' brief and affidavit in support of their motion for summary judgment allege that there have been no violations of any statute, Corrections Department Policy Directives, or the Parole Regulations. Plaintiffs offer affidavits giving specific incidents of alleged violations, and allege established practices of defendants which ignore and violate the relevant statutes, rules and regulations. Some of the more serious violations

alleged are: (1) failure to have all pertinent information assembled by the date specified in M.C.L.A. 791.235 necessitating delays in rendering decisions and in ultimate release dates; (2) failure of the Board to advise prisoners in advance of the factors to be considered, as required by Policy Directive 45.09; (3) failure to provide meaningful access to information to be relied upon by the Board as required by Policy Directive 45.09; (4) making it difficult or impossible for prisoners to gain access to their files in de facto violation of Policy Directive 45.09 and the Michigan Freedom of Information Act; (5) failure to follow Policy Directive DWA-40.02 regarding disclosure of psychological and psychiatric evaluations; (6) denial of a meaningful opportunity to present evi-

dence or challenge material relied upon by the Board; and (7) giving inadequate statements of reasons for Board action in violation of Policy Directives 45.05 and 45.09.

This case involves disputes over the procedures employed by the Parole Board and the complex interaction of statutes, policy statements, and practice that require the development of a factual record before a decision can be rendered. When the pleadings and affidavits before the court are construed in favor of the party opposing the motion and that party is given the benefit of favorable inference that can be drawn from the evidence, U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962), there are sufficient issues of fact that remain to preclude the granting of a motion for summary judgment. This

is particularly true because this a civil rights suit in which claims must be closely scrutinized. Perry v. Sindermann, supra. The defendants' motion for summary judgment is denied as to the claim that the state does not comply with its own statutes and regulations.

III.

Plaintiff's motion for class certification is still outstanding. Any further briefs that the parties may wish to submit on that question should be filed by September 15, 1978, and the motion will be heard on September 28, 1978, at 3:00 p.m.

An appropriate order may be submitted.

/s/
JOHN FEIKENS
UNITED STATES DISTRICT JUDGE

DATE: AUGUST 17, 1978
Detroit, Michigan

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

SUPREME COURT OF THE UNITED STATES

KENNETH L. McGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, et al.

Petitioner,

No. 91-976

vs.

JAMES ANTHONY SWEETON, et al.

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondents, James Anthony Sweeton, et al., by counsel, ask leave to file the attached brief in opposition to petition for writ of certiorari, without payment of costs and to proceed in forma pauperis. A class member's affidavit in support of this motion is attached.

Dated: JAN. 22, 1992

Respectfully submitted,

MICHIGAN CLINICAL LAW PROGRAM

Paul D. Reingold (P27994)
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SUPREME COURT OF THE UNITED STATES

KENNETH L. McGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, et al.

Petitioner, No. 91-976

vs.

JAMES ANTHONY SWEETON, et al.

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Rose Marie Green, being first sworn, state that I am a member of the respondent class in the above-captioned case. In support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of the case.

I further swear that I am not presently employed; that within the past twelve months I have not received any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source; that I do not own any cash or checking or savings accounts; that I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

The other class members and I are all inmates in the Michigan correctional system.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Rose Marie Green

Subscribed and sworn to before me on this 22nd day of January, 1992.

My commission expires: 11-15-93

SUPREME COURT OF THE UNITED STATES

KENNETH L. McGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, et al.

Petitioner, No. 91-976

vs.

JAMES ANTHONY SWEETON, et al.

Respondent.

PROOF OF MAILING

On February 14, 1992, I mailed two copies of:

Respondents' Brief in Opposition to Petition for Certiorari; and this proof of mail service

to: David Edick
Assistant Attorney General
Corrections Division
PO BOX 30216
Lansing, MI 48909

by: first class mail

I declare that the statements above are true to the best of my information, knowledge and belief.

Date: 02-14-92

Betty Scheffler

Betty Scheffler
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February 14, 1992

FEDERAL EXPRESS

Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

McGinnis, et al. vs. James Anthony Sweeton, et al.
Case No. 91-976

Dear Clerk of the Court:

Enclosed for filing please find the original and twelve copies of the Respondents' brief in opposition to petition for certiorari and proof of mail service.

Also enclosed is a Motion to proceed in forma pauperis with a class member's affidavit in support attached.

Very truly yours,

MICHIGAN CLINICAL LAW PROGRAM

Paul D. Reingold
Counsel of Record

/b
encls.
xc: David Edick

No. 91-976

In the
Supreme Court of the United States
January Term, 1992

[redacted] L. McGINNIS, et al.,

Petitioners,

vs.

[redacted] ANTHONY [redacted], et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

QUESTIONS PRESENTED

Where

(1) in 1981 the district found that state rules and regulations created liberty interests protected by due process;

(2) the defendants then entered into a consent judgment that required more of them than was required under state law;

(3) in 1984 the district court denied the same jurisdictional challenge that is being made now, and the court's order was not appealed; and

(4) enforcement of the consent judgment has continued up to the present day:

I.

Can the defendants (petitioners) collaterally attack the district court's jursidiction (to enter the original consent judgment) under Rule 60(b)?

II.

Can the defendants (petitioners) assert immunity under the Eleventh Amendment?

LIST OF PARTIES

The parties are accurately described in the petitioners' list of parties. All parties in the district court and court of appeals are parties in this action (although named officials have been automatically substituted as defendants and members of the plaintiff class have come and gone).

TABLE OF AUTHORITIES

Other **Pages**

OPINIONS BELOW

Please refer to the petitioners' brief. An underlying opinion of the U.S. District Court for the Eastern District of Michigan, which was entered on March 31, 1981, appears at the end of this brief as Appendix 1a-13a. An excerpt of a bench opinion issued on May 31, 1984, is attached as Appendix 14a-21a.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on September 17, 1991. The Clerk of this Court extended the time to respond to the petition to February 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PLAINTIFFS' (RESPONDENTS') STATEMENT OF THE CASE

a. 1977 - 1981

This action was filed in September, 1977, as a class action on behalf of inmates within the jurisdiction of the Michigan Department of Corrections ("MDOC") who are eligible for parole. The action challenged the procedures of the MDOC and its Parole Board, alleging that the parole hearings provided were inadequate, that hearings and decisions were untimely, that the parole decision-making process was not uniform, and that inmates were being denied access to their files, among other claims. Six of the seven counts pled in the first amended complaint alleged violations of the Fourteenth Amendment to the U.S. Constitution.[1]

In August, 1978, the district court dismissed the claim that the plaintiffs had a right to a full-blown due process parole hearing. The district court denied that claim because "...in this circuit at least, the requirements of due process are not applicable to parole release hearings." See Opinion dated 8-17-78, Petitioner's Appendix at 118a, emphasis added. The court held that release on parole was not a right, and therefore the plaintiffs' claim that they were entitled to a particular kind of hearing--including adequate notice, an opportunity to be heard, representation by counsel, a written decision, a transcript, etc.--could not be sustained. (Although the plaintiffs disagreed with the court's ruling on this issue, they gave up their right to appeal the merits when a consent judgment was later entered.)

---

[1] Only one count of the complaint (Count VII) alleged a pure pendent state law claim, for violations of the Michigan Administrative Procedures Act. It was dismissed by stipulation.

Contrary to what the defendants assert in their petition for certiorari, at pp. 3-4, the district court did not dismiss all of the plaintiffs' federal constitutional claims. In the very next breath the district court said:

> The [preceding] section of this opinion dealt with what due process rights plaintiff inmates have directly under the United States Constitution. When, however, the state itself provides by statute or regulations that certain procedures must be followed in determining whether or not an inmate is entitled to parole, independent liberty interests are created and the due process clause requires certain minimum procedures "to assure that the state-created right is not arbitrarily abrogated." [Citations omitted.]

Id. at 118a-119a, et seq. The district court made it clear that although the plaintiffs' surviving claims might stem from state law or regulation, they were for federal constitutional violations, and the action would therefore proceed under the federal civil rights law, 42 U.S.C § 1983. Id. at 118a-126a.

In October, 1979, the defendants moved to dismiss on the grounds that only state law claims remained in the case, and that therefore the court should abstain. The motion was denied by an order dated March 10, 1980, and the defendants did not appeal.

Instead of litigating the case further, the defendants began to negotiate. Between March 10 and June 11, 1980, the defendants signed no fewer than five separate partial consent judgments, in addition to a stipulation and order for entry of a consent judgment, and a stipulation and order to give notice to the class. At about the same time the parties filed cross-motions on the issues that had not been settled (relating to inmates' access to their files, and to the distribution of certain parole information). In December, 1980, with the defendants' approval,

the district court entered a final partial consent judgment as to all of the uncontested issues.

If there were any doubt about the vitality of the federal claims in the case, it was dispelled on March 31, 1981, when (after re-assignment) the district court issued a memorandum opinion and order denying the defendants' motion to dismiss, and granting the plaintiffs' motion for summary judgment on the remaining contested issues in the case.

Summarizing the litigation to date, the court said:

> The complaint alleges a pattern of activity in violation of pertinent state regulations, state law and the United States Constitution. The plaintiffs assert that their Fourteenth Amendment due process rights are abridged by the state's method of administration of the parole system as a whole.
>
> On December 16, 1980, after an extended period of discovery, the disposition of several motions, and diligent efforts to settle the litigation, the parties entered into a partial consent judgment resolving many of the claims of constitutional violations originally asserted.

Opinion at p. 1, Respondents' Appendix at 1a (emphasis added).

Contrary to the defendants' characterization of the case as involving "only state law claims," the court went on to say:

> ...the law of this case, as formulated by Judge Feikens more than two years ago when this litigation was on his docket, is that the existence of state statutes, regulations and policies regarding the parole system as a whole impart independent liberty interests to those inmates participating in the system. ...The shortcomings of present policies constitute not only a violation of [Michigan law], but primarily, as far as this court is concerned, a violation of federal constitutional due process rights which were born from state promises and are now totally independent of the definitions or perimeters [sic] of the Michigan Act. This violation is a federal issue, to be addressed by this court.

Id., Respondents' Appendix at 3a-4a.

In deciding the motion, the court plainly applied federal constitutional law. For example, regarding access to inmate files, the court acknowledged the disagreement among the circuits about whether or not there was a direct constitutional right that inmates be given some access to their files, but it clearly found such a derivative right created by state law in this case:

> ...this court holds (as did Judge Feikens) that the state's promulgation of policies and regulations which purport to provide for some right of access, creates a liberty interest in inmates that cannot be arbitrarily or capriciously abridged.
>
> The rules promulgated by the Department governing access to files have been furnished to this court. They are listed by reference number, among the stipulated facts, and consist of thirteen operating procedures, two policy directives and eight Director's Office Memos.

Id. at 8a. Having identified substantive rights created by these state rules and regulations, the district court found that:

> ...the Department implements these rules in a manner that places insurmountable obstacles in the path of an inquiring inmate.

Id. Accordingly, the court granted the plaintiffs' motion for summary judgment, and awarded attorneys' fees under 42 U.S.C. § 1988 (again indicating that federal claims had been decided).

The defendants initially appealed, but on August 28, 1981, the court signed and entered a final consent judgment, incorporating into one document the terms of all of the partial consent orders that had been entered before, and settling the issues that had been contested in the cross-motions the previous spring. The defendants voluntarily dismissed their appeal in December, 1981. By entering into the consent judgment, the plaintiffs also gave up their right to appeal on the parole hearing issue.

It is noteworthy that the consent judgment does not simply order the defendants to obey the state parole statute. It sets up a series of mechanisms (that the defendants negotiated and approved) going well beyond the requirements of state law--to make sure that the parole system operates in a uniform, fair, and timely way, and to guarantee that the rights created by state law and regulation are not unconstitutionally abridged. See Petitioners' Appendix at 62a.[2]

Nor does the final consent judgment require the MDOC to grant parole to any class member, or dictate the kind of hearing that the defendants must provide. Rather the consent judgment concerns the uniformity of the parole process and of parole decision-making, the timeliness of that decision-making, the timeliness of release in cases where parole is granted, access to files, monitoring of the judgment, etc. Although the defendants characterize the consent judgment as a "highly intrusive" scheme imposed upon them by the court, Petition at 16, in fact the defendants agreed to every provision, after having drafted or co-written or re-written nearly every paragraph of the judgment.

b. 1981 - 1985

Monitoring of the final consent decree began in August, 1981, and continued for 30 months. In February, 1984, when the parties were fighting about whether or not monitoring should be

---

[2] For example, the consent judgment requires that all initial parole hearings must be held at least 90 days before the earliest release date (with some exceptions). See ¶ III(B). Although this provision exceeds the requirements of the state parole statute, it was designed to give the defendants enough lead time to make the decision about parole, and to implement a favorable decision, before an inmate's earliest release date.

extended, the defendants moved to vacate the consent judgment. Citing this Court's decision in Pennhurst II, which had just been decided, the defendants again argued that the consent judgment was based exclusively on state law and that therefore the federal court lacked jurisdiction to enter it in the first place. The defendants also argued that changes in state law justified vacating the consent decree. That motion was denied in November, 1984, and monitoring was extended by the court. The court said that the defendants had "waived their immunity completely by their participation in every step of this litigation," and it reiterated that Michigan rules and regulations created liberty interests that were enforceable under the U.S. Constitution in federal court. Respondents' Appendix at 18a-19a. The defendants accepted the ruling of the district court and did not appeal.

In June, 1985, when a final monitoring report showed that the defendants' performance was improving and that parole guidelines had finally been drafted, the district court allowed the monitoring to end.

c. 1987 - 1991

On August 5, 1987, the trial court re-opened the case and appointed substitute counsel to represent the class in light of indications that the defendants had not complied with the 1981 consent judgment. The case was re-opened after the district court got a flood of complaints from inmates whose decisions or releases were way beyond the time limits imposed by the judgment, and when it was revealed that the parole guidelines drafted in 1985 still had not been implemented. The defendants took no appeal from the re-opening of the case.

The plaintiffs then engaged in discovery and began monitoring the defendants' compliance with the consent judgment. The plaintiffs spent 10 months evaluating the defendants' compliance. This was met with consistent recalcitrance by the defendants, for which the district court imposed Rule 11 sanctions against them.

In June, 1988, after further briefing and hearings, the trial court found that the defendants were out of compliance with the timeliness requirements of the consent judgment, and that parole guidelines still had not been implemented. It renewed the formal monitoring process for another year. Once again, the defendants did not exercise their right to appeal.

In January, 1990, after 18 months of extensive discovery and monitoring, the plaintiffs filed a comprehensive report documenting the defendants' non-compliance with the consent judgment. The plaintiffs also filed a motion to find the defendants in continued non-compliance--and seeking additional and ongoing relief--so that at last the consent judgment might be obeyed.

In March, 1990, the defendants filed a motion to dismiss and/or to modify the consent judgment. (This is the motion on appeal now.) Despite the earlier rulings against them, once again they argued that the district court never had jurisdiction to enter the consent judgment in 1981 because the judgment was based exclusively on state law. Alternatively, the defendants argued that the judgment should be modified to reflect supposed changes in state law. The 1990 motion raised exactly the same issues that had been raised in 1984, and that had been decided adversely to the defendants then, and that had not been appealed.

In May, 1990, the district court issued an order finding the

defendants in non-compliance, setting a new monitoring period, appointing a magistrate to monitor compliance, and requiring the defendants to implement parole guidelines within one year. (No guidelines had been implemented in the nine years since the entry of the consent judgment, despite its provisions requiring the defendants to do so.) The district court denied the defendants' motion to dismiss for lack of jurisdiction, and this time the defendants appealed.[3]

d. The Sixth Circuit Opinion

The Sixth Circuit agreed with the plaintiffs in all respects. It affirmed the district court's denial of the motion to dismiss on jurisdictional grounds, and it reversed the district court's modification of the 90-day standard.[4]

On the jurisdictional issue the panel strongly disagreed with the defendants' characterization of the case:

---

[3] The lower court also allowed one modification of the consent judgment. The defendants had asked the court to change the 90-day hearing provision to a requirement that hearings be held "at least one month" prior to the release date. This request was based on purported state statutory changes occurring after the entry of the consent judgment. The lower court inexplicably granted the modification even though the language of the statute (requiring hearings "at least one month" before the release date) had been the same since the consent judgment was entered in 1981, and even though the same request for modification had been denied in 1984. Accordingly, the plaintiffs cross-appealed on the modification issue.

[4] On the modification issue, the Sixth Circuit used the same standard just approved by this Court in Rufo v. Inmates of Suffolk County Jail, ___ U.S. ___, 60 U.S.L.W. 4100 (decided January 15, 1992). The Sixth Circuit found that state law had not changed, that the language of the consent judgment did not conflict with state law, that there was no policy reason to modify the judgment, and that the purpose of the judgment would not be furthered in a more efficient way by the modification. Petitioners' App. at 45a-51a. This issue has not been appealed by the defendants, and it will not be addressed further.

> ...the [defendants] continue to insist that the liberty interest involved here is the right to parole. The lower court on numerous occasions stated that the liberty interest involved is not in the right to parole, since none exists under the Greenholtz rationale, infra, but in the state-created procedures that make up the parole decision-making process. This is a fundamental element of this action, which should not be further mischaracterized.

Petitioners' Appendix at 18a-19a (emphasis added).

In affirming, the Sixth Circuit held that the district court was entirely within its rights to identify and to recognize state-created interests protected by the due process clause of the U.S. Constitution. The panel noted that this Court has "clearly ruled that protectible liberty interests may arise from state-created statutes, regulations, rules and policies." Id. at 19a-20a.

If the defendants had chosen to litigate the claims instead of settling them, it is possible that the district court or the Sixth Circuit might have found the plaintiffs' state-created rights to be more circumscribed. But the defendants chose to settle the case, and therefore, according to the Sixth Circuit, they cannot now object to "the enforcement of a remedy that they selected." Id. at 28a. The plaintiffs likewise bound themselves by consenting to the judgment, thus waiving their right to appeal the parole hearing issue that had been decided against them.

Accordingly, the Sixth Circuit held that (1) the district court clearly had jurisdiction; (2) the current jurisdictional challenge was decided in 1984, without an appeal, and could not be relitigated now; (3) the Eleventh Amendment was no bar because the judgment was based on federal claims; (4) the district court had authority to enforce compliance with the consent decree on an

ongoing basis; and (5) Rule 60(b) could not be used to re-litigate the merits, or to mount what was in essence a collateral attack on the district court's decision that it had jurisdiction.

In December, 1991, the defendants filed their petition for certiorari to challenge the decision of the Sixth Circuit. The plaintiffs now file this timely response.[5]

ARGUMENT

I. THE DEFENDANTS CANNOT RE-LITIGATE THE MERITS OF THE CASE UNDER THE GUISE OF A JURISDICTIONAL CHALLENGE

A. The claims resolved by the consent judgment were federal constitutional claims, and not pendant state law claims.

As noted above, the defendants have relentlessly tried to characterize this case as involving only pendant state-law claims. This characterization of the case is flatly wrong, and is completely unsupported by the record. As the plaintiffs' counter-statement of the case shows, the district court was as clear as it could be on this issue. The district court said repeatedly that the plaintiffs' surviving claims--which were ultimately settled in the consolidated consent judgment--were federal constitutional claims, based on rights granted to the plaintiffs by state laws, regulations, policies, and procedures. See Plaintiffs' Statement of the Case, supra.

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[5] In the meantime the case has gone forward in the district court. In August, 1991, after the end of a monitoring period, the plaintiffs' filed another motion to find the defendants in non-compliance. As of that date parole guidelines still had not been implemented, and the defendants had failed or refused to supply information from which compliance with the timeliness provisions of the consent judgment could be measured. On January 23, 1992, in an opinion from the bench, the district court granted the plaintiffs' motion, ordered supplemental relief, and extended monitoring for another year.

The defendants further mischaracterize the case in their petition for certiorari. Now they say that both the district court and the court of appeals described the inmates' state-created rights as procedural rights only (that could not give rise to any constitutional protections). Petition at 12. But neither the district court nor the court of appeals expressed that limited view of the plaintiffs' rights. See Pet. App. at 16a-25a, and Resp. App. at 3a.

Obviously most of the rights created by state law or regulation were not litigated, but were settled. Therefore it is impossible to know how the district court would have come out as to each right claimed, or what might have happened had the case been litigated to conclusion, or had the defendants filed an appeal on this issue. As to some claims, the courts might have found that the state rules and regulations were not couched in sufficiently mandatory language to confer a right, or that the substantive limitation on official discretion was too narrow to establish the right alleged. See e.g., Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989) (prison rules on visiting lacked sufficient mandatory language to support a state-created right of visitation absent certain conditions); and Olim v. Wakinekona, 461 U.S. 238 (1983) (a state creates a protected liberty interest by placing substantive limitations on official discretion).[6]

The one certain thing is that the rights being claimed--the

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[6] Had the plaintiffs not entered into the consent judgment, but appealed, they might have persuaded the Sixth Circuit that Michigan regulations create a constitutionally protected right to parole. See Board of Pardons v. Allen, 482 U.S. 369 (1987).

right to uniform standards of decision-making, the right to timely hearings, the right to timely release once a favorable decision was made, the right of access to files, etc.--were not procedural rights. The plaintiffs argued, and the district court twice agreed, that as to these issues the state rules and regulations limited the discretion of state officials without regard to the procedures they employed.

The defendants may have had broad discretion in deciding whether or not to grant parole, or in the kind of hearing that they would offer, but as to the standard that they were to apply, and as to the timing of the decision, and as to the implementation of a favorable decision (release), and as to inmates' access to their files, the plaintiffs claimed that the defendants' discretion was limited in a substantive, mandatory way, that gave the plaintiffs rights regardless of the procedures used. These are precisely the sort of rights that have long been enforceable in federal court. See e.g., Vitek v. Jones, 445 U.S. 480 (1980); Hewitt v. Helms, 459 U.S. 460 (1983); and the cases cited by the Sixth Circuit on this issue, Pet. App. at 20a-21a.

That those rights were infringed because the Parole Board followed, or failed to follow, certain procedures, does not make the rights themselves procedural. The defendants' fundamental mischaracterization of these issues was rejected by the courts below, and it should be rejected again here. As long as there was any colorable federal claim which formed the basis for the entry of the consent judgment, the defendants' claim that the judgment was "void" must fail.

This Court has held that in order to enter a consent decree,

a district court must find only that the decree (1) "springs from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," (2) "come[s] within the general scope of the case made by the pleadings," and (3) "further[s] the objectives of the law upon which the complaint was based." Local Number 93, Internat'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986). Surely that standard was met here.

B. Even if it were arguable that the district court erred in finding state-created interests subject to constitutional protection, that decision on the merits could not be overturned under Rule 60(b).

The essence of the defendants' argument is (1) that the rulings of the district court over the years on the merits of the constitutional questions raised were simply wrong, (2) that if the case should have been dismissed on the merits, then there was no subject matter jurisdiction, and the consent judgment is "void," and (3) if it is void, it is subject to collateral attack at any time under Rule 60(b)(4) and on appeal here, even though the defendants failed to appeal any of the previous rulings and entered into a consent judgment.

This attempt to relitigate issues under the guise of Rule 60(b) is a shamelessly improper use of the rule. All of the issues raised in the defendants' petition are issues "on the merits" which have already been decided numerous times below and which this Court should not address. As aptly noted by the Ninth Circuit in a far less egregious attempt to relitigate issues:

> We agree with the district court. The modification of the decree to extend to all the inmates sentenced to death wherever housed has been in effect for years.... The prison officials had their opportunity to appeal the modification of the decree when the court ordered them to negotiate and when the court accepted the

> Monitor's First Report and modified the decree to extend to the inmates wherever housed. This is the Monitor's Fourth Report. We will not allow prison officials four bites at the apple.

Thompson v. Enomoto, 915 F.2d 1383, 1390 (9th Cir. 1990), cert. denied, 60 U.S.L.W. 3520 (1992)(emphasis added).

If this Court were to permit the re-litigation of decided issues under the defendants' analysis, the principles of finality and the timeliness of appeals would mean nothing. Such a decision would be antithetical to the very purpose of consent judgments. Every case within this Court's jurisdiction in which the district court has entered an order or judgment, by consent or otherwise, would be open to belated attack "on the merits" by claims that the district court's denial of a motion to dismiss or summary judgment years before was "void" and thus that the court did not have judicial authority to issue it.

The defendants did not seek Rule 60(b) modification of the consent decree in light of judicially recognized bases such as new or unforeseen changes of fact or law. See Rufo v. Inmates of Suffolk County Jail, ___ U.S.___, 60 U.S.L.W. 4100 (1-15-92); Akers v. Ohio Department of Liquor Control, 902 F.2d 477 (6th Cir. 1990). The defendants' position is simply that the consent judgment is "void" for jurisdictional reasons.

Rule 60(b)(4) provides that the court "may relieve a party ...from a final judgment...[if]: (4) the judgment is void." The rule also provides that "a motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

Rule 60(b) is a discretionary rule that has been "administered...with a scrupulous regard for the aims of finality."

Wright, Miller & Cooper, Federal Practice and Procedure, § 2857 (1985).

In balancing the two interests--the need for finality in litigation versus respect for the jurisdictional limits of the federal courts--it is black-letter law that a court's decision as to subject matter jurisdiction may not be attacked belatedly through a Rule 60(b) motion:

> It must be noted...that a court has jurisdiction to determine its own jurisdiction. ...[A] court's determination that it has jurisdiction of the subject matter is res judicata on that issue, if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject matter jurisdiction and failed to do so.
>
> * * * * *
>
> The rule has been that a court's determination that it has subject matter jurisdiction is res judicata of the issue, if the jurisdictional question actually was litigated and expressly decided and full faith and credit must be given to the judgment. This is true even if the court is mistaken in its decision.

Wright,Miller & Cooper, supra, §§ 2862 and 3536 (emphasis added). Subject matter jurisdiction was raised by the defendants in their 1984 motion to vacate under Rule 60(b)(4), and that motion was denied, and was not appealed. In fact, many portions of the defendants' brief in the Sixth Circuit were taken verbatim from their 1984 brief attacking subject matter jurisdiction.

As noted above, certainly the plaintiffs raised claims pursuant to 42 U.S.C. § 1983 which presented issues generally reviewable under Article III. The claims involved due process interests springing from a host of state statutes, administrative rules, and policies which limited official discretion and which were alleged to be arbitrarily and capriciously applied as a matter of custom and practice on a system-wide basis. See Memorandum Opinion of 3/31/81, Resp. App. at 1a et seq.

The defendants have confused a total lack of power to adjudicate with the issue of whether the decisions on the merits were correct. The "void" judgment language of Rule 60(b)(4) is not intended to allow collateral attack upon a consent judgment, never appealed, nine years after it was entered, just because the defendants assert that the court's rulings were incorrect.

As one noted commentator has concluded:

> In brief, then, except for the rare case where power is plainly usurped, if a court has the general power to adjudicate the issues in the class of suits to which the case belongs then its interim orders and final judgment, whether right or wrong, are not subject to collateral attack, so far as jurisdiction over the subject matter is concerned.
>
> So called quasi-jurisdictional facts are not a part of jurisdiction over the subject matter, and the lack thereof will not afford the basis for a collateral attack upon a judgment rendered by the courts which we are discussing. Therefore, a judgment of a federal court is not void, and is not subject to collateral attack on the ground that the rendering court lacked federal jurisdiction, although the judgment is subject to direct attack on that ground....

Moore's Federal Practice § 60.2b2, Rule 60(b)(2d. ed. 1991), pp. 60-229-231 (emphasis added).

As the Eighth Circuit said back in 1943:

> Every court in rendering judgment has the authority and does, tacitly or expressly, determine its jurisdiction over the parties and over the subject matter and its decree sustaining jurisdiction is not open to collateral attack. Stoll v. Gottlieb, 305 U.S. 165, 171, 172, 59 S. Ct. 134, 83 L.Ed. 104; Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 377, 60 S.Ct. 317, 84 L.Ed. 329. And when the court which rendered the judgment, having jurisdiction over the subject matter and the parties, has power to adjudicate the issues in the class of suits to which the case belongs, its decision is on the merits [citation omitted] and the validity of its judgment, when collaterally attacked, is not affected by an erroneous decision. Such a judgment is not void, even though there be gross error in the decree.

Walling v Miller, 138 F.2d 629, 632, cert. denied, 321 U.S. 784 (1944)(emphasis added). The principle of Chicot that subject matter jurisdiction cannot be collaterally attacked was specifically reaffirmed in Insurance Corporation of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 702, n. 9 (1982).

In this case the Sixth Circuit carefully reviewed each of the arguments made by the defendants, and rejected them. Pet. App. at 15a-38a. Even the concurring judge agreed that the defendants could not re-litigate the jurisdictional issue now, whether the district court was right or wrong when it decided that it had jurisdiction in 1981.

Accordingly, certiorari should be denied on the first question raised by the defendants. They are wrong on the facts, and wrong on the law, and they raise no issues of national importance or on which there is any disagreement among the circuit courts of appeal. See U.S. Supreme Court Rule 10.

II. THE DEFENDANTS CANNOT RE-LITIGATE THE MERITS BY INVOKING THE ELEVENTH AMENDMENT

The defendants' second argument is even more disingenuous than the first. They say that because the decree entered by the district court was based only on state law, any enforcement of the decree now would be barred by a combination of Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) and the Eleventh Amendment.[7]

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[7] As noted above, the defendants are wrong to describe the district court's orders as based only on state law, and for that reason alone their Pennhurst/Eleventh Amendment argument must fail. But even if the "state law only" description were true, the defendants are far too late to invoke Pennhurst and the Eleventh Amendment as a means to void the original judgment.

To support this proposition the defendants cite just one case, Lelsz v. Kavanagh, 807 F.2d 1243, reh'g denied, 815 F.2d 1034 (5th Cir. 1987), cert. dismissed, 483 U.S. 1057 (1987). Lelsz is distinguishable from the present litigation on at least four separate grounds, any one of which would be enough to undercut the defendants' reliance on it.

1. The nature of the challenge: In Lelsz the defendants were not challenging the validity of the original consent judgment (which had been entered in 1983). Rather, the challenge was to a 1985 order enforcing the consent judgment. The defendants claimed that the 1985 order granted new and different relief beyond what the consent judgment itself permitted, and beyond what federal law would allow as well. Thus, they said, the 1985 order impermissibly exceeded both the scope of the consent judgment and the reach of federal law. The defendants argued that because the new 1985 order was ostensibly based only on state law, and not on federal law, the court could not enter such relief without violating Pennhurst.

To the contrary, in the present case the defendants are challenging only the entry of the original consent decree in 1981, arguing that it is void ab initio. No new order has ever been entered--let alone challenged--changing the substance of that original consent judgment, or going beyond straightforward enforcement of its terms as written. In the present case it is not new, excessive, and exclusively state-based enforcement that is at issue, but the validity of the underlying consent judgment itself.

2. The timeliness of the challenge: The challenge to the

new order in Lelsz was timely. That is, the defendants made their objections in the district court, and when the district court entered the 1985 enforcement order despite their objections, they filed a timely appeal.

The defendants in this case cannot make the same claim. Pennhurst was decided on January 23, 1984. On February 27, 1984, the defendants filed a motion to vacate the consent judgment, citing Pennhurst (and of course again alleging that the consent judgment was based entirely on state law). On November 24, 1984, the district court denied the defendants' motion, and they did not file an appeal. Thus, the defendants' Pennhurst-based challenge (to the district court's exercise of jurisdiction in entering the original consent judgment in 1981) was decided with finality in 1984. As noted above, the defendants cannot file the same motion six years later just by calling it "jurisdictional."

3. The waiver of immunity: In Lelsz the defendants could argue that they had never surrendered the state's Eleventh Amendment immunity as to the 1985 order. Even though the defendants had consented to the entry of the original judgment, and to the relief which might flow directly from it, they were completely justified in arguing that they had never consented to the new, broader relief that was now being forced upon the state by the federal court.

In the present case the defendants cannot make that argument. Pennhurst bars the federal court from entering injunctive relief--based on state law--only in the absence of consent. Here, the defendants explicitly agreed to the entry of five separate partial consent judgments, a series of stipulated

orders, and a final consolidated consent judgment. For the next nine years the defendants subjected themselves to the full authority of the federal court, including monitoring, reporting of data, findings of non-compliance, and payment of attorneys' fees, all without any appeal being taken. Since the defendants in this case consented, and consented, and consented again, Pennhurst does not apply at all. See Resp. App. at 18a-19a.

The defendants also ignore settled law on this point. Where a state enters into a consent decree without having fully litigated the mixed state and federal claims upon which the district court bases its jurisdiction, the state's Eleventh Amendment immunity is waived.

For example, in Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), inmates filed suit against the New York Department of Corrections alleging violations of state-created liberty interests in prison visitation rights. Id. at 241. After the court ruled that the state's practices violated procedural due process rights, the parties avoided trial and entered a consent decree controlling the circumstances under which the Department could suspend or terminate visitation privileges. Id. Eight years after the decree was entered, the state sought to modify the decree. As here, the state argued that the decree violated the Eleventh Amendment as interpreted in Pennhurst II, which prohibited a federal court from imposing injunctive relief against state officials for violations of state law. Id. at 243. The Second Circuit rejected the state's argument. The court held that although Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) "requires [of the court] an

independent assessment of 'inherent jurisdiction,' ...by consenting to the decree, the [state] waived [its] Eleventh Amendment immunity." Id. at 244, citing New York State Ass'n for Retarded Children, Inc. v. Carey, 596 F.2d 27, 39 (2d Cir. 1979) cert. denied, 444 U.S. 836 (1979)(consent judgment itself constitutes a waiver of Eleventh Amendment immunity where the defendants agreed to the judgment before trial).

Similarly, in Duran v. Carruthers, 885 F.2d 1485 (10th Cir. 1989) cert. denied, 493 U.S. 1056 (1990) inmates of a New Mexico prison filed a class action charging that prison conditions violated their constitutional and federal statutory rights. The parties agreed to a consent decree without the benefit of litigation to determine the validity of the claims. Id. at 1486-87. Seven years later, the state Attorney General filed a motion to vacate, arguing that since portions of the decree did not vindicate federal rights, "the defendants...are beyond the reach of a federal district court." Id. at 1487. The Tenth Circuit rejected the defendants' argument, stating that "by consenting to the entry of the decree, 'without any findings of fact,' [the defendants] left to the court the power to construe the pleadings...." Id. at 1489. See also Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984) (the totality of the state's conduct, including agreement to a consent decree and years of monitoring, constitutes unequivocal consent to federal jurisdiction); and Vecchione v. Wohlgemuth, 558 F.2d 150 (3d Cir. 1977), cert. denied, 434 U.S. 943 (1977)(waiver of Eleventh Amendment immunity is final when the consent judgment itself becomes final).

4. The nature of the waiver: Lelsz suggests that the state's consent in that case (even to the original judgment) would have been no consent at all, because Pennhurst had not yet been decided, and therefore the state was unaware that it had any immunity to waive. The Fifth Circuit in effect gave the state an extra benefit of the doubt, considering that the state's timely raising of the issue (and its timely appeal) was its first post-Pennhurst bite at the apple.

Unlike the defendants in Lelsz, the defendants here can hardly claim now that they have never before had the chance to litigate the waiver of an immunity that (until Pennhurst) they did not know existed. They did litigate it after Pennhurst, and they lost, and they chose not to appeal, way back in 1984. Just as the plaintiffs cannot revive the claims that they litigated and lost (and did not appeal) in the early 1980's, the defendants should also be barred.

Finally, Lelsz itself is unusually weak authority for any proposition, undeserving of the weight the defendants give it. The case is a 2-1 decision with a strong dissent. The panel's opinion is a mishmash of doctrine, combining and confusing issues of jurisdiction, comity, immunity, and waiver of immunity by consent. The confusion is heightened by the fact that Lelsz involved almost identical facts to Pennhurst (a challenge to the conditions and treatment of the mentally impaired at state facilities), so that the panel decision came close to treating Pennhurst as a kind of law of the case. Further, on petition for re-hearing en banc, the Fifth Circuit split 7-7, barely preventing a re-hearing of the case. (One judge on senior status was

even moved to urge the full court to hear the case, even though he did not get a formal vote.) The seven judges who favored re-hearing published a caustic opinion criticizing the 2-1 decision, and noting that "Pennhurst has been badly misapplied in this panel decision." Lelsz, supra, at 1036.

From the longer post-Pennhurst perspective of 1992, probably the best that can be said of Lelsz is that it authorizes the federal court to treat Pennhurst as a change of law that might justify a motion to modify a consent judgment (entered into before Pennhurst was decided). That is exactly what the defendants did in 1984 when they filed a motion under Rule 60(b). They lost the motion, and they didn't appeal, and as is shown above, they shouldn't be able to re-litigate that issue now.

Thus, on the second question presented in the petition for certiorari, the defendants have not shown any issue of national importance, any disagreement among the circuits, or any clear error in the court below that cries out for correction. Accordingly, the defendants' petition for certiorari should be denied.

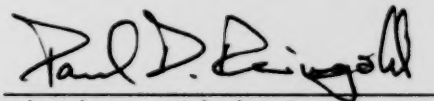
At this point the case is in ongoing litigation in the district court, where it belongs. The district court is seeking to enforce, at last, the terms of the consent judgment agreed to by the defendants in 1981. If the district court is successful, and if the defendants are held to their promise to make the parole system fairer and more efficient, then the savings to Michigan taxpayers will be enormous. After four years of litigation, and 11 years of post-judgment supervision by the district court, the defendants cannot seriously argue, at this

late date--that the district court lacked or lacks subject matter jurisdiction.

CONCLUSION

For the above reasons, the plaintiffs (respondents) request that the defendants' petition for certiorari be denied.

Respectfully submitted,



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Dated: Feb. 14, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES ANTHONY SWEETON; OSCAR PARTEE; and JAMES SIKON, Individually and On Behalf of All Other Person Similarly Situated,

Plaintiffs,

-vs- Case No. 77-72230

PERRY JOHNSON, Director of the Michigan Department of Corrections; LEONARD McCONNELL, Chairman of the Parole Board of the State of Michigan; GORDON FULLER, HOWARD GROSSMAN, HONDON HARGROVE, DONALD THURSTON, DELORES TRIPP, and EDWARD TURNER, Members of the Parole Board of the State of Michigan,

Defendants.

/

MEMORANDUM OPINION AND ORDER

This class action was brought on behalf of all inmates within the present and future jurisdiction of the State of Michigan Department of Corrections, whose parole eligibility is determined by the State of Michigan Parole Board. The defendants are the Director of the Department, and the members of the Parole Board. The complaint alleges a pattern of activity in violation of pertinent state regulations, state law and the United States Constitution. The plaintiffs assert that their Fourteenth Amendment due process rights are abridged by the state's method of administration of the parole system as a whole.

On December 16, 1980, after an extended period of discovery, the disposition of several motions, and diligent efforts to settle the litigation, the parties entered into a partial consent judgment resolving many of the claims of constitutional violations originally asserted. Following notice to all class members, receipt and review of objections to the partial consent judgment from scores of inmates in the state system, the addition of one organized group of these inmates as party plaintiffs, and revisions of the proposed settlement in light of inmates' objections and suggestions,

the court approved the partial consent judgment. That order was entered on December 29, 1980.

Two issues remain in litigation, (inmates' access to their own files and distribution of a parole information booklet) which have been submitted to this court on cross-motions for summary judgment, there being no material disputes of fact. After consideration of the parties' stipulated facts, their briefs and oral argument, the plaintiff's motion is hereby granted, and judgment entered accordingly.

ABSTENTION

Defendant has raised the issue of "abstention" in its brief. Defendant asserts that the file-access portion of the lawsuit, which challenges present policies under the United States Constitution and the Michigan Freedom of Information Act, [MCLA §15.231 et seq; MSA §4.1801(1)], is best left to the state courts.

Procedurally, the abstention argument is untimely. The cross-motions under consideration here were filed in June and July of 1980, and argued to the court in January of 1981. In October of 1979, the defendants first raised this "abstention" issue, by motion. That motion was fully briefed by the parties, and following oral argument, the court denied the motion in March of 1980 (after re-assignment of this case from the docket of the chief judge of this district, in November, 1979). No motion for rehearing was timely filed, and the defendants have presented no justification for belated reconsideration of that decision. To the contrary, the successful efforts of the parties to resolve a major portion of this complex litigation, and the future role of this court in enforcing and overseeing the implementation of that joint resolution compels the disposition of the rest of the case by this court, and no other. Moreover, if defendants' tardy request for reconsideration were appropriate under the Federal Rules of Civil Procedure and the Local Rules of this court, it would nevertheless be

denied. The "abstention" doctrine, as announced in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), instructs federal courts to abstain from ruling when construction of previously uninterpreted or uncertain state laws control a constitutional issue placed before the federal court. Such is not the case here. First, the Michigan Freedom of Information Act (hereinafter MFOIA) is not a new, untested or uninterpreted statute. Courts of this state have entertained litigation under it since enactment in its most recent form in 1976. The 1976 codification was, at least in part, a reworking of existing administrative law embodied in the state's Administrative Procedures Act, being Public Act 306 of 1969. Thus, the current legislation has a history which, if not venerable, is at least old enough to enable the federal courts to avoid treading on "new" territory which should first be explored by the state. Furthermore, the state courts have looked to the abundant federal case law interpreting the parallel federal FOIA, 5 USC §552, et seq, for assistance, which this court is equally well equipped to do.

Most importantly, the law of this case, as formulated by Judge Feikens more than two years ago when this litigation was on his docket, is that the existence of state statutes, regulations and policies regarding the parole system as a whole impart independent liberty interests to those inmates participating in the system. Thus, though the meaning of the MFOIA is not unimportant to determining access rights, this court must first and foremost independently assess whether access rights are fairly and adequately dispensed as promised. The shortcomings of present policies constitute not only a violation of the MFOIA, but primarily, as far as this court is concerned, a violation of federal constitutional due process rights which were born from state promises and are now totally independent of the definitions

or perimeters of the Michigan Act. This violation is a federal issue, to be addressed by this court.

The defendants' argument that abstention is advisable due to the pendency of a similar state lawsuit, DeLion, et al v. Michigan Department of Corrections, C.A. No. 78-22032, Ingham County Circuit Court, must also fail. In fact, the DeLion lawsuit seeks different relief, is not yet a certified class action and should not stay the hand of this court. The defendants rely on Younger v. Harris, 401 US 37 (1971), which precludes a federal court from acting to enjoin an on-going state criminal prosecution -- a vital doctrine, which is part of the doctrine of "abstention", but one not relevant here.

The request for rehearing on the abstention issue is, therefore, denied, and the court will reach the merits of both the file access issue and the parole information booklet distribution issue.

INMATE ACCESS TO FILES

On May 19, 1980, the parties entered into a stipulation of facts, summarizing the present policies of the Department. These stipulated facts demonstrate that, prior to the 1976 passage of the Michigan Freedom of Information Act, inmates were not permitted any access to the files concerning them maintained by the Department, and that post-1976 access is extremely limited and varied.

The files in question include a "Central Office File," kept in the Department's offices in Lansing, Michigan; an "Institutional File," kept at the institution where the inmate is incarcerated; and assorted medical, academic, accounting and other files. The Central Office File usually is more comprehensive than the others, as it includes direct correspondence from external sources to the Department or Parole Board, Board notes, screening materials, and Field Service reports not found in other files. The Central Office File is the file utilized by members of the Parole Board for

their reference and preparation, before each prisoner's Parole Board hearing.

At present, the Department will not send the Central Office Files to the institutions for actual viewing by inmates under any conditions. Requests received in Lansing for "my file" elicit a direction to the inmate to consult his institution, in order to gain access to his institutional file. Requests for specific documents out of the Central Office File are complied with by furnishing copies to inmates, but the requests must specifically name the document in question. Access to Institutional Files varies from one facility to another. All of the facilities exempt certain documents from any disclosure at all (such as pre-sentence reports, police reports), limit disclosure of other types (such as psychological reports), and allow disclosure of others to inmates. This disclosure is further limited in frequency, from facilities which permit access once a year (including the State Prison of Southern Michigan and the Marquette Branch Prison, the two dominant facilities in the state system) to those permitting access every six months, to those (including the women's facility and the prison camps) permitting access as frequently as requested. At least one facility also limits the time that is made available for "hands-on" inspection of the file by an inmate--Marquette Branch Prison limiting this to one hour (once a year).

An analysis of the stipulated facts and the details of the policy directives issued by the Department, demonstrates that the Department's current policy is typified by an obstructive refusal to reveal vital information to inmates involved in the parole process.

Having established policies, purporting to grant a right of access, and to regulate it (the existence of some such policies probably being mandated, at least in this state, by the MFOIA), the precise terms of such access must not be arbitrary and unreasonable, or they risk violation of due

process. Arbitrary implementation of arbitrary rules violates the inmates' liberty interest, which the state has itself created, Wolff v. McDonnell, 418 US 539 (1972), Meachum v. Fano, 427 U.S. 215 (1976), Walker v. Hughes, 558 F2d 1247 (6th Cir. 1977).

The basic purpose of access should be borne in mind -- the inmates who make these requests are not to be viewed as annoying paranoids who seek to fill their "personal and self-serving needs," as the defendants assert in their brief. Defendants' view that the plaintiffs seek "nothing more than a discovery tool and to engage in fishing expeditions," contraverts the intention of the MFOIA and gratuitously insults the overwhelming majority of prison inmates. This court is not unmindful of the administrative burdens already placed on the persons in charge of this state's prison system (whose overcrowded conditions constitute the basis of judicial and legislative action elsewhere than before this court), and is also aware that the long periods of unstructured time available to inmates allows them time to seek assistance from prison personnel, and indeed the courts, which might seem time-consuming or trivial. But an inmate who faces a Parole Board, whose members have virtually unreviewable control over his or her personal freedom, is entitled to make demands on prison officials, and to know the information upon which those members will make their decision, without such demands being ignored or subjected to unreasonable dissection. Requests for access to files which are understandable to an average person must be complied with, once the state has, in essence, "promised" its inmates that some form of access will be allowed.

Without adequate access to files, and the information contained therein, an inmate has no real possibility of refuting inaccurate, biased, or misleading information therein. The files, and the Central Office File in particular, are heavily relied upon by Parole Board members

who, of course, have no personal knowledge of an inmates' behavior, either prior to or during incarceration. The inmate is afforded an opportunity to express his or her view to the members, but can more effectively do so when he or she has access to the information (or most of the information) on which the Parole Board members rely.

In its brief, and in oral argument, the plaintiff asserts that inmates have a direct federal constitutional right to access to institutional files. This is an issue not specifically addressed by the United States Supreme Court, although its recent decision in Greenholtz v. Nebraska Penal Inmates, 442 US 1 (1979) clearly holds that due process requirements at a parole board hearing are minimal. The specific issue of file access is one on which various circuit and district courts have split, with courts in the Second and Fourth Circuits and a district court within the Eighth Circuit holding that there may be such a due process right, under certain circumstances (Holup v. Gates, 544 F.2d 82, 2d Cir. 1976, cert den 430 US 941 1977; Williams v. Ward, 556 F.2d 1143, 2d Cir. 1977, cert den 434 US 944, 1978; Franklin v. Shields, 569 F.2d 184, 4th Cir. 1977, en banc, cert den 435 US 1003, 1978; Paine v. Baker, 595 F.2d 197, 4th Cir., 1979; and Cooley v. Sigler, 381 FS 441, Minn., 1974). Other courts have held that this right of access is not constitutionally mandated -- Dye v. United States Parole Commission, 558 F.2d 1376, 10th Cir., 1977; Ott v. Ciccone, 326 FS 609, D.Mo. 1970; Wiley v. United States Board of Parole, 380 FS 1194, D.Penn. 1974; Barr v. United States, 415 FS 990, D. Okla 1976; Wagner v. Gilligan, 425 FS 1320, D. Ohio 1977; Nunley v. United States Board of Paroles, 439 FS 887, D. Okla. 1977; Gahagan v. Pennsylvania Board of Probation, 444 FS 1326, D. Penn. 1978.

Judge Feikens, in an opinion rendered in this cause in August of 1978, also held that the procedures generally employed by the defendants in the parole process need not

comport with federal constitutional due process guarantees, relying on the case law preceding, and adopted by Greenholtz. To the extent that that ruling implicitly holds that there is no direct due process right to file-access, it is the law of this case.

At all events, it is not necessary for this court to grapple with this theory, since this court holds (as did Judge Feikens) that the state's promulgation of policies and regulations which purport to provide for some right of access, create a liberty interest in inmates that cannot be arbitrarily or capriciously abridged. The existence of the MFOIA also serves to "vest" a liberty interest in the inmates, as well as serving as a guideline to this court in its determination of what policies are reasonable, non-arbitrary and therefore constitutional.

The rules promulgated by the Department governing access to files have been furnished to the court. They are listed by reference number, among the stipulated facts, and consist of thirteen operating procedures, two policy directives and eight Director's Office Memoranda. They are comprehensive, and much of the procedure spelled out therein is constitutionally adequate. It appears, however, that there is a great deal of unreasoned disparity between the terms of the rules among the several facilities, that certain terms are unduly restrictive, and that the Department implements these rules in a manner that places virtually insurmountable obstacles in the path of an inquiring inmate.

Critical to this dispute is the required specificity of file requests. Presently, an inmate's desire to view or obtain copies of documents in his or her Central Office File is completely thwarted if the request is for "my file," or "all the documents in my file," or "the contents of my Central Office File." The provisions of the MFOIA and case law establish that citizens need only make requests which are descriptive enough to sufficiently enable the public agency

to find the public record (MCLA §15.233(1) and Citizens for Better Care v. Department of Public Health, 51 Mich App 454, 1974, lv to app den 392 Mich 758, 1974). The federal act contains the same language, and is interpreted in the same way (5 USC §552(a)(3) and Bristol-Myers Co. v. FTC, 424 F.2d 935, D.C. Cir., 1970). A prison inmate should be held to no higher standard of specificity, and requests addressed to Lansing for "my file" or the like, should be complied with, in full, by prompt provision of copies of all non-exempt documents found in the file. Subsequent similar requests should be met by the provision of all documents in the file, non-exempt, which came into the file since the last request. Logic dictates that the Department not be required to furnish papers which it has previously furnished to an inmate.

A copying charge is presently levied on non-indigent inmates for such activity, which the court finds to be a reasonable practice.

Physical inspection of the Central Office File does not seem a reasonable possibility to this court. Inmates, of course, cannot be transported to Lansing easily, and the plaintiffs have not suggested this course of action. Similarly, however, release of the Central Office File to the institution, potentially with great frequency, could hamper the efficient operation of the parole process, and complicate access to records for members of the Parole Board.

Copy-access to Institutional Files should be handled in the same manner as this court instructs the defendants to manage copy-access to the Central Office File. Any policies which require the inmate to name the documents in the file without seeing it first, a practice which the plaintiff aptly labels as a "grab-bag" effect, violate the inmate's due process rights.

Physical inspection of the Institutional Files by general population inmates poses little administrative or security risk to the defendants and, in fact, is routinely

allowed in some facilities now. Rules precluding review by inmates in segregation or otherwise separated from the main population for disciplinary reasons are sensible, and may be maintained. However, harsh limitations to annual or bi-annual inspection, found in numerous facilities, are unreasonable. A citizen who wishes to inspect any type of public record is not limited to a certain number of requests (or one) per year, under either the Michigan or federal FOIA. A limitation of that type would hamper the free discovery of information regarding public affairs, since such information is constantly growing and changing. Significantly, the defendants have presented no justification for this arbitrary limitation, or for its variance from one facility to another, and the rule unfairly restricts inmates' access rights to highly personal information on which their liberty may hinge. An inmate may encounter multiple occasions during a year when the imminence of parole hearings, parole decisions, or events otherwise affecting the term of incarceration and eligibility for parole, compel him or her to seek information from the files. On these occasions, no matter how near in time, the inmates should be allowed to request copies of any documents added since the last inspection of the Central Office File, and to inspect or obtain copies from the Institutional File. Requirements of due process cannot countenance any arbitrary limitation on the number of times during a year that such a request may be made, and all policies to the contrary cannot stand.

The court also finds that the time limitations for study of file materials (such as the one hour maximum at Marquette Branch Prison, Michigan Dunes Correctional Facility, and the Michigan Intensive Program Center) are arbitrary and irrational, and cannot continue. The court presumes that prison authorities can exercise reasonable discretion to ensure that inmates examining files are not somehow taking advantage of this ability to spend undue amounts of time away

from other required activies. These authorities can use their own reason to curtail over-long inspections. But the implicit suggestion behind such limitation -- that an incarcerated person will eagerly prolong such review sessions, in order to achieve some unexplained and improper or unlawful personal goal -- is the very essence of an arbitrary limitation, in violation of due process.

Requests for copies or for physical inspection should be promptly answered, and the defendants are ordered to modify existing regulations, as needed, to bring them all into conformity with the five-day response period dictated by the MFOIA [MCLA §15.235(2)].

Certain documents have been declared to be exempt from any disclosure by the Department, in its regulations and policy guidelines. It does not appear that the various facilities' regulations are uniform in this regard. Some are very specific, while others offer only generic proscriptions, such as the exemption from disclosure of information that would "place another individual in potential danger," or of psychological reports whose release "would be detrimental to the [inmate's] condition or treatment." These limitations must be uniform among all facilities, and the defendants are instructed to submit a complete listing of documents categorized as exempt or non-exempt for the court's approval. Only those documents whose release would pose a serious security risk, harm to the inmate or others, or invasion of another's privacy should be exempted.

The defendants are directed to revise the guidelines and policies in issue, and to administer them in accordance with this opinion. Nothing in this opinion should be construed to invalidate or render unnecessary those parts of current policies which are designed to protect the inmate's right of access (such as the duty of the Department to explain the reason for non-disclosure of exempt material.) The inmate's right to access, once given (by both Departmental policy

and the MFOIA) cannot be rendered useless by strict and arbitrary limitations. Inmates are to be informed of the new policies, once formulated, and the parties are requested to compose a plan permitting monitoring of compliance with this opinion and order by the plaintiffs' counsel, over the next six months. No damages are awarded to the plaintiff for past violations of their due process rights, or their rights under the MFOIA.

DISTRIBUTION OF THE PAROLE INFORMATION BOOKLET

The second issue presented to the court on cross-motions (defendants having addressed it in oral argument, but not in their brief), concerns the dissemination of a parole information booklet. The parties have stipulated to composing the booklet, and argee to its inclusion in the Resident Guide Book -- a large compilation of prison rules and regulations which is given to all inmates upon entering the institution.

The defendant argues that this method of distribution is sufficient to inform inmates of their rights in the parole process. Plaintiff submits that the information contained in the booklet should be redistributed to individual inmates, at the time that they begin the parole process. Each inmate is entitled to a meeting with officials at the initiation of this process to prepare a Parole Eligibity Report, and plaintiffs suggest that this is the occasion on which the booklet should be redistributed to the inmate.

Defendants' reason for opposing this suggestion is that it is "unnecessary." The plaintiffs have pointed out that the administrative burden and the expense of a second distribution would be minimal (projecting that a two-year supply, of 15,000 copies, would costs $1,000.00).

The procedure that plaintiff requests is more useful to inmates, for whom the time between entry into an institution and parole eligibility may be long. They are frequently moved among the various institutions of the system, and have

minimal control over the security of their possessions. Defendant does not earnestly oppose it, and plaintiffs' motion is therefore granted.

ATTORNEY FEES

Plaintiffs seek attorneys fees for their successful litigation of this civil rights suit, under the authotity of 42 USC §1988. The court will award such fees based upon the parties' agreement upon amount, or upon motion filed within thirty days of the entry of judgment in this case.

Anna Diggs Taylor

ANNA DIGGS TAYLOR,
United States District Court

Dated: March 31, 1981

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF MICHIGAN

EASTERN DIVISION

JAMES A. SWEETON, et al,
Plaintiffs,
-vs- NO. 77-72230

PERRY JOHNSON, et al,
Defendants.
_____/

EXCERPT - OPINION

BEFORE THE HONORABLE ANNA DIGGS TAYLOR, JUDGE

On Thursday, May 31, 1984, Detroit, Michigan

APPEARANCES:

ROBERT GILLETT, ESQ.
Attorney-at-Law
Appearing on behalf of Plaintiffs

WILLIAM GOODMAN, ESQ.
Attorney-at-Law
Appearing on behalf of Plaintiffs

BRIAN MACKENZIE, ESQ.
Attorney-at-Law
Appearing on behalf of Defendants

Bradly L.B. Williams, CSR-1339
Official Court Reporter

Detroit, Michigan

May 31, 1994

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* * *

(The Following is an excerpt)

THE COURT: In the Defendant's motion to vacate the Court's final order, consolidation of opinion order and consent judgments dated September 1st, 1981, is denied. The Court first must note that a Judge's mental finality is central to the exercise of judicial power and responsibility.

If simply putting an end to disputes were not a valuable social goal, there would never be a reason for Courts to exist, because our purpose on this earth is to accomplish that purpose. And, the argument presented here by this motion, proponents of this motion, render it sort of as a simple futility, on the face of it, particularly in United States Disttrict Court, I suppose in the United States Judiciary.

The Court also notes that it's final order does reflect a number of agreements which were entered into voluntarily by the parties to this case. Many of the matters in the order were not adjudicated by this Court, but were hammered out by the parties, often under the auspices of the Court, but not by the Court's decision making the 6th

Circuit Court of Appeals, noted in Williams vs Goobivitch (ph), 620 Fed Sec., 909, a consent decree is essentially a settlement agreement subject to continued judicial policing the terms of the decree unlike those of a simple contract, have unique properties. A consent decree has an attribute of both a contract and a judicial act. A consent decree should be strictly construed to preserve a bargain or positi of the parties.

A Court has no occasion to resolve merits of disputed issues or the factual underpins of the various legal theories advanced by the parties. A consent decree is also a final judicial order, judicial approval of a settlement agreement, placing the power and the prestige of the Court behind the compromise struck by the parties. And, this final order of the Court is indeed, a compromise, and on page two, Section One, paragraph B, the final order states, "This final order is not intended to constitute an admission of liability by Defendants on those issues resolved by the consent judgments of June 11, 1980, and December 16, 1980."

The Court's jurisdiction over this case is and was proper, and this judgment may not now be vacated under the Federal Rules as being void. The Federal Court has jurisdiction to determine its own judicial authority. So, if the defendant has challenged the Court's subject matter

jurisdiction and the Court issue has been resolved against defendant by a final judgment, the judgment is not void but is Res Judicata on the issue of jurisdiction.

In this case the Defendants have challenged the Court's subject matter jurisdiction at least three times, and ruled against at least that many times on, specifically, the question of whether this Court had jurisdictional authority to hear and decide this case.

These rulings commence with Judge Feikens' decision in favor of the Federal jurisdiction in August of 1978. And, this Court in March of 1981, again found that there is Federal jurisdiction. The law in this case, as formulated by Judge Feikens more than two years ago when this litigation was on his docket, is that the existence of State Statute regulations and policies regarding the parole system, as a whole, impart independent liberty interests for those inmates participating in the system. So, this Court previously decided the jurisdictional question and its decision is Res Judicata, and is the law of the case.

As to the challenges made, Defendants appealed from that decision, and they voluntarily dismissed their appeal and that decision in all other points.

ThePenthurst (ph) decision is not applicable in a situation of this posture. In this case the Court did have proper Federal jurisdictional authority over the matter.

And incidentally the Plaintiff's claim the Michigan Freedom of Information Act - - their access to file the claim in the 8-28-1981 order, is noted. The claim under the Freedom of Information Act in Michigan is handled by stipulation in that order that that claim does not, in and of itself, create constitutional due process rights.

However, the stipulation recognized as well, this Court's authority to interpret the Michigan Authority to the pending jurisdiction of the Court, because of this Court's jurisdiction of the other matters.

The Defendants finally waived their immunity, completely, by their participation in every step of this litigation. On the merits, they're releiving themselves of complete litigation of the controversy between the parties by obtaining a settlement from Plaintiffs and getting approval of this Court of that settlement agreement without admitting to any wrong doing or liability.

The issue of jurisdiction, as all other issues in the case have been resolved by settlement between the parties, and the orders entered, permanently, thereto, and there has been complete waiver of any question of the jurisdiction of this Court in the matter.

As to the argument as to whether Federal jurisdiction is presented by the claims of the plaintiff, under the present state of the law, although this present

state of the law does not govern the situation, the Court notes that the Michigan Law, rules and regulations, as it found before, still do create the liberty interest of releasability under certain circumstances, a presumption of releasability that Plaintiffs maintain for the prisoners.

That is a Federally actionable right, that is a constitutional liberty interest over which this Court always has jurisdiction. So, the request to vacate the Court's order in the matter is denied.

(Excerpt Concluded)

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

I Bradly L.B. Williams, do hereby certify that I reported the proceedings had in open Court in the above entitled matter before the HONORABLE ANNA DIGGS TAYLOR, United States District Court Judge, For the Eastern District of Michigan, at the time and place hereinbefore set forth; that the same was thereafter reduced to typewritten form under my supervision, and that the foregoing transcript is a full, true and accurate transcript of my stenotype notes.

Bradly L.B. Williams, CSR-1339
Official Court Reporter

Dated: April 20, 1990

Any mechanically produced copies of this transcript are certified only with original signature.